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Reconstructing Section Five of the Fourteenth Amendment to Assist Impoverished Children

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RECONSTRUCTING SECTION FIVE OF THE FOURTEENTH AMENDMENT TO ASSIST IMPOVERISHED CHILDREN

JAMES WILSON*

I. INTRODUCTION	391
II. POVERTY AMONG THE YOUNG: A BRIEF SURVEY.....	396
III. JUDICIAL RELUCTANCE TO AID POOR CHILDREN.....	402
A. <i>Suspect Class Analysis</i>	403
B. <i>Fundamental Rights Analysis</i>	406
C. <i>Poor Children as a Suspect Class</i>	410
IV. THE VALUE STRUGGLE UNDERLYING THE COURT'S RELUCTANCE TO HELP THE POOR	411
V. THE LEGAL ACADEMIC RESPONSE TO POVERTY	415
VI. DILUTING EQUAL PROTECTION TO HELP POOR CHILDREN..	421
A. <i>The Mechanics of Limited Dilution</i>	422
B. <i>The Substance of Dilution</i>	423
C. <i>Applying the New Doctrine to Impoverished Children</i>	426
1. <i>Doctrinal Reorganization</i>	426
2. <i>Policy Considerations</i>	428
VII. THE CONSTITUTIONALITY OF A DOUBLE STANDARD AND OF A LIMITED DILUTION	431
A. <i>The Double Standard and Limited Dilution do not Conflict with Marbury v. Madison</i>	431
B. <i>Are "Limited Dilution" and Richmond's Double Standard Consistent with Existing Section 5 Law?</i>	432
C. <i>Doctrinal Analogues Outside Section Five</i>	438
D. <i>Nonjudicial Proposals to Enhance Congressional Powers</i>	440
IX. JURISPRUDENTIAL RESERVATIONS	446
A. <i>Conservative Criticisms</i>	446
B. <i>Liberal Criticisms</i>	448
C. <i>Institutional Criticisms</i>	450
X. CONCLUSION.....	452

I. INTRODUCTION

Liberal lawyers encounter grim alternatives caused by the Supreme Court's relentless shift to the right, particularly if they consider stare decisis a major constitutional value. They can attack specific decisions, demonstrating inconsistencies with prior cases, conclusory reasoning and/

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or poor policy. They can use history, jurisprudence or even literature to make broad-based critiques of the Court's increasing callousness. They can propose counter-doctrine which is consistent with existing caselaw. The third response may appear quixotic, even naive, given the present Court. Nevertheless, exploration of progressive alternatives illuminates existing doctrine and provides potential openings if the Court ever decides to become more compassionate.

This article pursues the third technique, maintaining that the Supreme Court's most recent affirmative action decisions, *City of Richmond v. J.A. Croson, Co.*¹ and *Metro Broadcasting, Inc. v. F.C.C.*² provides a surprising opportunity for the Court to offer constitutional protection to many Americans who are currently underprotected, particularly to poor children. In *Richmond*, the Court held that a city violated the equal protection clause of the fourteenth amendment by mandating a fixed percentage of city construction contracts for minority-owned businesses, even though the Court had previously held in *Fullilove v. Klutznik*³ that Congress could establish a virtually identical affirmative action plan to assist minorities seeking state construction contracts that receive federal funding. In Part II of the principal *Richmond* opinion, Justice O'Connor, joined by Chief Justice Rhenquist and Justice White, distinguished *Fullilove*.⁴ O'Connor decided that Congress had greater powers than the States to establish affirmative action programs pursuant to section 5 of the fourteenth amendment: "That Congress may identify and redress the effects of society-wide discrimination does not mean that, *a fortiori*, that States and their political subdivisions are free to decide that such remedies are appropriate."⁵ Justice O'Connor neither justified this double standard, which provided more judicial deference to Congressional action than to state action, nor explored its implications. In *Metro Broadcasting*, all nine Justices accepted the argument that section five gives Congress more powers than the states. But the bitter divisions among the Justices in *Metro* over the merits⁶ indicates that the contours of this double standard remains unresolved.

This Article will argue that the *Richmond/Metro* double standard is acceptable in such difficult areas as affirmative action, particularly if the Court also adopts this Article's primary proposal that the Court should

¹ 109 S. Ct. 706 (1989).

² 110 S. Ct. 2997 (1990).

³ 448 U.S. 448 (1980).

⁴ 109 S.Ct. at 717-720. Justice O'Connor frequently cited *Days*, *Fullilove*, 96 YALE L.J. 453 (1987).

⁵ 109 S.Ct. at 719. Justice Scalia also distinguished between congressional and state powers in his concurring opinion, *id.* at 735-39.

⁶ Justice Brennan, writing for Justices White, Marshall, Blackmun, and Stevens, concluded that section five gave Congress and the F.C.C. the power to create minority preferences to enhance ethnic and program diversity. (*Metro Broadcasting, Inc. v. F.C.C.*, 110 S.Ct. 2997, 3010 (1990)). O'Connor, joined by Justices Scalia, Kennedy, and the Chief Justice, dissented on the ground that Congress could only remedy *identified* past racial discrimination in the industry. *Id.* at 3031. O'Connor's commitment to *Fullilove* appears limited, at best.

sometimes permit Congress to "dilute" Supreme Court decisions.⁷ One implication of the *Richmond/Metro* double standard is that the Court may have also permitted Congress to "dilute" some of the Court's prior fourteenth amendment decisions. The Court should have decided *Fullilove*, *Richmond*, and *Metro* the same way even if the cases had arrived in a different order; otherwise, basic constitutional rights and structures would be resolved by timing, a factor no less arbitrary than a coin flip. In other words, if the Court had first held that the *Richmond* plan violated equal protection, it still should have upheld the Congressional minority preferences. The apparent "right" of white contractors not to be prevented on the ground of race from receiving governmental contracts in the absence of detailed findings of prior governmental racism would then have been "diluted" or at least "limited" to the "right" not to be so treated by states and local governments.

Now that dilution may be permissible, the Court should consider even more dilution. Congress should be able to invoke its section 5 powers to require or to permit states to establish affirmative action plans similar to the one in *Fullilove*, thereby effectively overruling *Richmond*. Section 5 is not a general grant of authority to Congress; it specifically authorizes Congress to enforce egalitarian values against the states. The section was passed to help resolve this country's racial problems.⁸ If Congress can require the states to act in a certain way — mandating affirmative action plans, for example — it should also be allowed to delegate its power to the states to establish affirmative action plans, giving the states discretion in applying the remedy. Such flexibility enhances federalism.

Dilution is consistent with the structural and policy arguments Justice O'Connor made in *Richmond*. Justice O'Connor noted that the fourteenth amendment is directly aimed at the states: "The Civil War Amendments themselves worked a dramatic change in the balance between congressional and state power over matters of race."⁹ Any Congressional power is less suspect, whether it affects federal activity (as in *Fullilove*), directly regulates the states (as was also the case in the *Fullilove*), or is delegated to the states. It is far harder for a vicious faction to take over Congress than to dominate a state or local government.¹⁰ Placing primary responsibility for the affirmative action issue in Congress also resolves some of the remedy's inherent dilemmas. Courts have difficulty determining which groups should receive what forms of affirmative action, for how long, and under what circumstances. For example, the *Richmond* plan

⁷ This endorsement of O'Connor's double standard does not extend to her application of the standard. In the *Richmond* case, she should have deferred to the Richmond legislature, particularly when Congress has established a similar remedy and had not used its powers to prohibit the states from implementing similar systems.

⁸ Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

⁹ 109 S.Ct. at 719.

¹⁰ See, e.g., THE FEDERALIST NO. 10 (J. Madison). See also Quint, *The Federalist Papers and the Constitution and the United States*, 77 KY. L. J. 369 (1988-89); Wilson, *The Most Sacred Text: The Supreme Court's Use of the Federalist Papers*, 1985 B.Y.U.L. REV. 65 (1985).

included "Orientals,"¹¹ but Asian-Americans are presently one of the most economically successful groups in our society. Who should decide when Asian-Americans no longer need special protection? As the *Richmond* Court observed, the majority in many local communities consists of minorities who might be tempted to use affirmative action plans not to remedy prior wrongs, but for impermissible racial reasons.¹² One also might be less suspicious when the majoritarian Congress, dominated by white males, decides to limit the powers of white males; such limits are unlikely to be either too severe or stereotypical.¹³ Finally, prohibiting Congress from reversing *Richmond* would generate doctrine approaching incoherence. The Court would need to hold that section 5, which grants Congress power to regulate the racial policies of states, only permits Congress to condition its own grants, but does not allow Congress to make the states comply with similar conditions.

The Court is not compelled to adopt any form of "dilution"; the issue was not directly before the Court. Only three Justices joined Part II of O'Connor's *Richmond* opinion, which used sections 5 to distinguish *Fulilove*. The Court may conclude that individuals have radically different rights depending upon whether the federal or state government is regulating them. The court may decide that the potential tension between disparate state and federal rights is so severe that it must overrule *Fulilove*. Or the Court, now influenced by Justice Souter, may narrow *Fulilove*. This article will not attempt to evaluate all the strengths and weaknesses of the different potential interpretations of these three cases and their myriad opinions. Instead, the article will focus on the desirability and the constitutionality of a limited form of dilution, a conception made viable, but not mandatory by *Richmond/Metro*. Demonstrating the value of this alternative is one of the best ways to argue that a limited conception of dilution should be adopted.

The article's specific recommendation is as simple as it is controversial: The Supreme Court should aggressively expand its definitions of equal protection and due process, as applied to the states, by sometimes explicitly giving Congress the power to over-ride its decisions pursuant to section 5 of the fourteenth amendment. The Court must specifically designate a right as dilutable; otherwise, neither Congress nor the states can alter that right. The text of section 5 is sufficiently broad to support such a construction: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."¹⁴

¹¹ 109 S.Ct. at 713.

¹² *Id.* at 722.

¹³ *Id.* O'Connor cited Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 739 n. 58 (1974). The Court should not be totally deferential to congressional affirmative action plans. For example, it should proscribe a congressional law authorizing affirmative action for white males because they have been previously discriminated against by earlier affirmative action programs. The Court should be particularly wary of an affirmative action program that either disadvantages blacks, the historical beneficiaries of the Fourteenth Amendment, or which benefits any racial-genetic group that dominates Congress.

¹⁴ U.S. CONST. amend. XIV, § 5. Professor Burt concludes: "The language of § 5 is simply fluid." Burt, *Miranda and Title II: A Morantic Marriage*, 1969 SUP. CT. REV. 81, 84 (1969).

The new doctrine's impact would border on the paradoxical. By relinquishing some power over finality in certain designated areas, the Court could expand rights in those areas. Because Congress would have the last word, the Court could act where it had previously refused to intervene. This final democratic check alleviates concerns about competency and legitimacy, two classic justifications for judicial restraint. If the Court either errs in its empirical assessments or seriously alienates the majority, its actions could be corrected by a majority in Congress.

The following example demonstrates how the doctrine would operate. In 1988, the Supreme Court held that states could charge bus fees to indigent school children in *Kadrmas v. Dickinson School District*.¹⁵ Under this Article's suggestion, the Court should initially hold that states could not charge indigent children such fees under the equal protection clause, but would also explicitly state that its decision could be reversed by Congress via section 5. Consequently, the Court could and should reconsider *Kadrmas*, knowing that Congress would have the last word on the always controversial issues of asset re-allocation.

How is the Court to determine which rights are dilutable and which are not? Virtually all existing equal protection rights should not be dilutable; they were created under the assumption that the challenged action was so "unreasonable" that neither the states nor Congress could so act.¹⁶ Prior judicial formulations of equal protection rights constitute the "core" of individual rights which are immune from the majoritarian process; existing rights also provide the Court with a baseline and a methodology for determining the scope of dilutable rights. The Court would still retain the power to create new non-dilutable rights in the future. On the other hand, the Court should be able to re-examine its prior holdings refusing to grant equal protection, because those decisions were premised, at least in part, on the assumption of judicial finality. A large number of groups and individuals may seek assistance under the suggested doctrine: the poor, the addicted, the disabled, the dying, AIDS victims, the mentally ill, and the aged.

This Article shall explore this proposed doctrine of limited dilution by applying it to poor children, a group that certainly needs more help from society than it is currently receiving.¹⁷ Poor children are the most vic-

¹⁵ 108 S.Ct. 2481 (1988).

¹⁶ *Oregon v. Mitchell*, 400 U.S. 112, 249 n. 31 (Brennan, J., dissenting and concurring). *Richmond* and *Plyer v. Doe*, 457 U.S. 202 (1982), may be partial erosions of this rule. In *Richmond*, the court established a double standard; *Plyer* implied that one might exist. In other words, the governmental action proscribed in *Richmond* was not found to be totally irrational or invalid; Congress could do what states could not. Thus for these two specific issues, dilution may already be permissible despite a prior Supreme Court finding that the state action violated equal protection.

¹⁷ There are three reasons to apply the new doctrine to poverty instead of affirmative action. First, the court is not adequately assisting young poor children. Second, one can better grasp the doctrine's strengths and limitations in a new area. Affirmative action doctrine is extraordinarily complex. Third, the author had completed an earlier draft of this article before *Richmond* was decided. The main concern of this article was and is poverty among the young.

timized group in our society. Unable to protect their interests by either the vote or money, they see their numbers swell. A chasm lies between their suffering and their existing constitutional rights.¹⁸ The Court has failed in its duty to protect innocent groups who have suffered from societal indifference and/or exploitation; political oppression of the innocent is a particularly odious form of tyranny.¹⁹ It is now time to consider the lives poor children are actually leading. After all, if no serious disease exists, there is no need for a disruptive doctrinal cure.

II. POVERTY AMONG THE YOUNG: A BRIEF SURVEY

The Supreme Court periodically makes a decision that can best be described in emotional terms, not analytical ones. My reaction to *Kardmas v. Dickinson School District*,²⁰ which validated a state's power to charge a fee to indigent school children to ride a school bus, was one of resigned disgust. The resignation was a response to precedent. Earlier in the same term, the Court had decided in *Lyng v. International Union, UAW*²¹ that Congress could deny food stamps to indigent families whenever a member of that family is on strike. In a relatively unknown case, *Carnes v. Kentucky*,²² decided in 1977, the Court denied certiorari to review a lower court decision allowing states to charge indigent school children for their textbooks. There had been intervening reasons for hope since *Carnes*; the Supreme Court had concluded that states could not bar children of illegal aliens from attending public schools in *Plyler v. Doe*.²³ But as we shall see, the Court has a history of limiting decisions favoring the poor to the facts of such decisions.

¹⁸ Virtually every day new data emerges about the suffering of the poor: "Taking inflation into account, the average family income of the poorest fifth of the population declined by 6.1 percent from 1979 to 1987, while the highest paid Americans saw family income rise 11.1 percent." *Richer Got Richer and Poorest Poorer From 1979 to 1987*, New York Times, at 1, 3-23-89 col 3.

¹⁹ This premise, which is a variation of Professor Shapiro's argument that the Court should provide a special forum for the under-represented, will not be defended in this particular article. See, e.g., M. SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW 34-39 (1966). Not every article need be a jurisprudential exploration of postulates. Sometimes the best defense of a proposition is to test its application.

The premise does not easily fit into existing Supreme Court doctrine. Under the new test, it would be far easier to prove systematic injury than it presently is to prove unconstitutional intentions. The Court would be required to articulate group rights and individual rights for those who are not "discrete", "insular" or even a "minority,"—for those who fail to meet any of the criteria under *Carolene Product's* footnote number four. *Carolene Products Co. v. United States*, 304 U.S. 144, 153 n.4 (1938). On the other hand, compassion for the innocent and wariness of penalizing people for reasons beyond their control may partially explain the Court's existing skepticism toward laws that penalize people with "immutable traits".

²⁰ 108 S. Ct. 2481 (1988).

²¹ 108 S. Ct. 1184 (1988).

²² 429 U.S. 1049 (1977) (certiorari denied).

²³ 457 U.S. 202 (1982).

The source of the disgust is more personal. During the 1970s, I litigated dozens of child abuse and neglect cases. The experience was so horrifying that it rendered me academically mute, until now. I cannot forget hearing about the temporary foster parents who inserted a lit cigarette up a five year old girl's vagina "to burn the Devil out." Nor can I forget representing the pathetic young man who applied a hot plate to his eight year old daughter's leg, leaving behind a pattern of half-moon marks. I frequently would return to my office from a morning in Juvenile Court to stare at a wall, swamped by rage, sadness and even self-loathing. Withdrawal into the academy has made life seem more benign. But the reality is that many more children, particularly poor children, are presently being brutalized by their parents and by society than when I actively practiced law.

No set of constitutional laws or doctrines can eliminate such tragedies, but the law sends struggling families clear messages about their worth (or worthlessness). These messages can either reinforce the cycles of poverty and misery, or can be serious gestures of compassion and support. Each generation of abused, neglected, and poor children will try to overcome their past agony, particularly when they raise their own children. If they believe they and their children are unwanted, irrelevant, even despised, many of them will be less able to control the anger that inevitably accompanies childrearing. Their children's misery will be a grim reminder of their present failures and their past suffering. At the same time, each subsequent generation of poor children will also learn how little they are cherished; their cruel teachers will be violence, hunger, and ignorance. Many children and parents will transcend these adversities. But many others will not. All may wonder, irrespective of the final outcome, why they had to suffer so much in this affluent society. Perhaps their parents are more responsible for their misery than is society, but will the children be able to make that distinction? Can they forgive their parents? Will they be able to forgive the rest of us?

This Article presented the two grisly anecdotes about child abuse to remind the reader of the actual content of many deprived children's lives, a content that easily can be obscured when only evaluating data, doctrine and debate — the traditional fare of constitutional analysis. As we shall see, the facts are not the focal point of the poverty dispute: the number of poor children has increased dramatically during the 1980s at the same time that the quality of their lives and the hopes for their future have diminished. For example, AFDC benefits, adjusted for inflation, have dropped thirty-three per cent between 1970 and 1984.²⁴ Supreme Court constitutional doctrine is not very ambiguous. The Court rarely will intervene on behalf of poor children. The legal academic debate over the constitutional rights of the poor is also discouraging. With a few recent

²⁴ Staff Of House Comm. On Ways And Means, 99th Cong., 2d Sess., *Background Material And Data On Program Within The Jurisdiction Of The Comm. On Ways And Means* 378-79 (Comm. Print 1986). See also *Old, but Far from Feeble*, 307 *The Economist* 7541, 30 (March 12, 1988).

exceptions,²⁵ liberal academics have offered process and structure to the poor, while conservatives endorse, for numerous reasons, judicial restraint.

Are poor children suffering so much that equal protection doctrine should be transformed?²⁶ Before turning to the national statistics, which are as distressing as any specific episodes of child abuse and neglect, contemplate sociologist William Wilson's description of a public housing project in Chicago:

Cabrini-Green includes eighty-one high- and low-rise buildings covering seventy acres on Chicago's Near North Side. In 1983 nearly 13,000 people, almost all black, were officially registered there; but . . . many more reside there than appear in the records . . . Minors were 66 percent of the registered population; 90 percent of the families with children were headed by women; 83 percent of the households were on welfare (AFDC or General Assistance), and 81 percent of the families with children received AFDC in 1983. In a nine-week period beginning in early January 1981, ten Cabrini-Green residents were murdered; thirty-five were wounded by gunshots, including random sniping; and more than fifty firearms were confiscated²⁷

²⁵ See Taylor, *Brown, Equal Protection, and the Isolation of the Poor*, 95 YALE L.J. 1700 (1986) [hereinafter Taylor]; Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HAST. L.J. 1 (1987) [hereinafter Edelman]; Black, *Further Reflections on the Constitutional Justice of Livelihood*, 86 COL. L. REV. 1103 (1986).

This proposed doctrinal shift is neither totally dependent upon nor mandated by this Article's major premise that the Court has an affirmative duty to protect the suffering innocent. One could come up with less sweeping justifications for the proposition, placing it more easily within the Court's existing jurisprudence. For example, the expansion of section five could be defended as a tool to help insufficiently protected "discrete and insular minorities."

On the other hand, one could reject the proposed law because dilutable equal protection would actually hurt or insufficiently help the disadvantaged. There is always a gap between basic assumptions and applications of those assumptions through doctrine, particularly when other competing interests must also be weighed in the balance, such as institutional competence and a presumption in favor of majority rule.

²⁶ Many conservatives might complain that this first question begs the important question: why should need or suffering determine constitutional rights? They would argue that the Constitution was only designed to ameliorate certain forms of suffering and injustice. Such retorts are really directed at this Article's assumption that the Court has a duty to protect innocents from majoritarian oppression and indifference.

²⁷ W.J. WILSON, *THE TRULY DISADVANTAGED* 25-26 (1987) [hereinafter W. WILSON]. Because of printing delays, the data in this article has become somewhat dated. For an update on the economic polarization in this society, see K. PHILLIPS, *THE POLITICS OF RICH AND POOR* (1990).

As of December 1989, the Census Bureau reported that the poverty rate had diminished somewhat to 12.8 percent of all Americans. That rate "was the lowest in the 1980's but was higher than for any year in the 1970's." Pear, *U.S. Reports Poverty Is Down but Inequality Is Up*, N.Y. Times, Sept. 27, 1990, A10, col. 1-5. Children continue to suffer the most: "The rate was 19.8 percent for children under 18 years of age and 22.5 percent for those under 6. Half of black children under 6 were living in poverty. Forty percent of Hispanic children and 17 percent of white children under 6 were poor." *Id.*

Professor Wilson used the Cabrini-Green bloodbath, which was exceptional only in its intensity, to demonstrate his thesis that in the past fifteen years a socially isolated underclass, consisting primarily of young blacks, has emerged in the cities. These children no longer have the positive examples of black middle class neighbors, who have moved to safer, wealthier neighborhoods.²⁸ These ghetto children attend schools that are unable to meet their educational needs; a 1984 survey of Chicago non-selective segregated high schools revealed that "only 2,000 of the original class of 25,000 students both completed high school and could read at or above the level considered average for the rest of the country."²⁹

Little comfort can be gained from knowing the worst. The plight of an average poor child is not that different from the misery in Cabrini-Green, as can be seen from the aggregate statistics which track a typical poor child's life from birth through adolescence. The most important fact is that while the overall number of poor has increased significantly in the 1980s, the number of poor children has soared during this time. The number of poor people has increased from 24.5 million in 1978 to 33.1 million in 1985, from 11.4 percent of the population to 14 percent.³⁰ These figures are based upon the official poverty line, which originally was defined³¹ at three times the amount needed for a frugal diet³². As of 1984, the poverty line for a family of four was \$10,600,³³ an income level no state welfare program met.³⁴ Furthermore, the extent of severe poverty has increased. Thirty percent of the poor had income at less than half of the poverty line in 1975, 33 percent in 1980, and 37.9 percent in 1984.³⁵ Black children continue to suffer at far higher rates than any other ethnic group.³⁶

²⁸ W. WILSON, *supra* note 27, at 7-8.

²⁹ *The Bottom Line: Chicago's Failing Schools and How to Save Them* (Chicago, Designs for Change, 1985) 2.5, quoted in W. WILSON, *THE TRULY DISADVANTAGED* 58 (1987).

³⁰ Edelman, *supra* note 25, at 11.

³¹ The creators of the "poverty line" knew that the level they set was still too low. *Id.* at 10.

³² D. MOYNIHAN, *FAMILY AND NATION* 185 (1986) [hereinafter D. MOYNIHAN].

³³ Edelman, *supra* note 25, at 10.

³⁴ *Id.* at 15.

³⁵ *Id.* at 12.

³⁶ Because black children continue to suffer in far higher proportions than other children, one can make the argument that they deserve special protection under the fourteenth amendment; if the goal of *Brown* was to provide equal education and opportunity for black children, then that goal has not been fulfilled. See Taylor, *supra* note 25. This Article will not pursue that line of argument for several reasons. First, William Taylor has powerfully made that argument, *id.* Second, the theory divides the poor along racial lines, when the problem needs to be dealt with more uniformly, both as matters of principle (racially explicit remedies should be kept to a minimum) and of politics (nonracial remedies are less likely to be attacked). A broader remedial order can sometimes be less controversial than a narrow, race specific opinion. The racial focus also misses the problem of generational inequalities. Finally, most AFDC families are not black: "in 1983, 43.5 percent of all AFDC families were black, 41.8 percent were white, 12.2 percent were Hispanic and American Indians, and the rest Asians." Chicago Tribune, American Millstone 108 (1986) [hereinafter CHICAGO TRIBUNE, MILLSTONE].

While the number of elderly poor has decreased dramatically in the past two decades, the number of poor children has increased from 13.8 percent in 1969 to 20.0 percent in 1984.³⁷ In his survey of the growing destitution of the young, Senator Moynihan used several statistical comparisons to prove how much children were suffering: "In 1984 approximately 33.7 million people were poor. Children, who represented less than 27 percent of the overall population, comprised 40 percent of the poor. Children were the only age group overrepresented in the poverty population."³⁸

The first hurdle poor children face is being born. The infant mortality rate among poor families remains depressingly high; in the Chicago ghetto of North Lawndale, the infant mortality rate "increased from 17.5 deaths per 1,000 live births in 1980 to 28.2 deaths per thousand in 1984."³⁹ It is impossible to determine how many of those children who did survive may have been permanently impaired by some combination of inadequate maternal diet, emotional stress, alcoholism, and/or drug addiction.⁴⁰ AIDS, which probably will spread the most quickly among the poor, is another killer of infants.

Those poor children fortunate enough to be born healthy are likely to be part of a continually deteriorating family structure. For example, the percentage of black children raised in two parent families has dropped from 63 percent in 1970 to 50 percent in 1978 to 46 percent in 1984.⁴¹ The correlation between single parent families and poverty is relentless; 75 percent of such families are poor.⁴² Children born out of wedlock tend to be born into persistently poor families. The number of illegitimate births in New York has increased from 11 percent in 1963 to 37 percent in 1983.⁴³ Although many families are only in poverty for a short period

³⁷ Edelman, *supra* note 25, at 11-12. Senator Moynihan stated that in 1984 the number of elderly who had incomes below the poverty line, after all noncash benefits were included, fell to 2.6 percent while the percentage of poor children only dropped to 14.9 percent. For children under six, the poverty rate was 17.5 percent, seven times that of the elderly. D. MOYNIHAN, *supra* note 32, at 111-112.

³⁸ D. MOYNIHAN, *supra* note 32, at 112. Such statistics are somewhat confusing because writers vacillate between defining poverty in terms of cash income or in terms of total benefits received. For example, in his book *FAMILY AND NATION*, Senator Moynihan fixed the poverty rate among preschool children at 24.0 percent on page 95, and at 17.5% on page 112. Children tend to benefit less from the inclusion of noncash benefits since such a large amount of those benefits are medical assistance, which primarily help the elderly. Judicial and political conservatives will note that such definitional problems—and the proof problems that underlie them—provide another reason why courts should not become constitutionally involved in wealth redistribution.

³⁹ CHICAGO TRIBUNE, MILLSTONE, *supra* note 36, at 125 (1986).

⁴⁰ The Chicago Tribune concluded that the medical efforts to save an infant cost over \$120,000. CHICAGO TRIBUNE, MILLSTONE, *supra* note 36, at 132. A single murder can cost taxpayers over a million dollars, *id.* at 56. Yet a mother with one child receives a total of \$397.00 in Chicago, and pays \$240.00 of that in rent, *Id.* at 92, 257.

⁴¹ W. WILSON, *supra* note 27, at 27.

⁴² *Id.*

⁴³ D. MOYNIHAN, *supra* note 32, at 172.

of time, Professor Wilson estimates that 60 percent of the poor are caught in a cycle which will last at least eight years.⁴⁴

Many children are not having their basic needs satisfied. Emergency food distribution centers face ever-increasing demands that they cannot meet.⁴⁵ The low-income housing stock continues to deteriorate; the estimates on the number of homeless, some of whom are children, range from 250,000 to 3,000,000.⁴⁶

Single parent families tend to be poorly educated, another disability that is passed on to their children, who are more likely to drop out of high school than their counterparts who live with both parents.⁴⁷

As these children grow older, their lives frequently deteriorate. Their schools are at best inadequate, and at worst reinforce their negative self-images.⁴⁸ Many of their peers pressure them not to perform well.⁴⁹ The crime rate remains appallingly high; in 1980 "black children committed 51% of the violent juvenile crime in the United States . . . [and] . . . 15% of all black adolescents in the 15-19 age group were arrested . . ." ⁵⁰ The drug problem only escalates. Crack, a highly addictive, yet inexpensive form of cocaine, is being spread throughout the country by violent, highly organized youth gangs.⁵¹ Many children have sex, and thus babies, at younger and younger ages. Twelve and thirteen year old girls are frequently becoming mothers.⁵² Nor are these youngsters easily able to get jobs in a society with a chronically high unemployment rate and with a steadily decreasing offering in unskilled, decently paying jobs: "Only a minority of non-institutionalized black youth are employed."⁵³

Perhaps the most disturbing fact is that large numbers of these children are becoming isolated from the rest of society- politically, intellectually, physically, economically and legally.⁵⁴ They no longer have a complete

⁴⁴ W. WILSON, *supra* note 27, at 176.

⁴⁵ Edelman, *supra* note 25, at 9.

⁴⁶ *Id.*

⁴⁷ W. WILSON, *supra* note 27, at 175.

⁴⁸ *Id.* at 103.

⁴⁹ The Principal of Lincoln High School in Jersey City described the problem: Some guys could do Lincoln on one leg . . . But they don't connect education with bettering their lives. For males, it's difficult to do well academically and be respected by their peers. Some very talented boys are hesitant about being talented. That's not the kind of thing the street honors. The street likes cool, clever, shrewd. But the best algebra student? No. Crime's all around. And they see the criminal element with the best cars, the flashiest gold and the nicest clothes. They're always seeing someone with half their intelligence with rolls of money.

The Principal traces part of the dilemma back to the home: "Imagine a home where a child never sees an adult go to work on a regular basis." *Jersey City Schools: A Long Road to Second-Class Citizenship*, N.Y. Times, June 25, 1988, at 11, col. xx.

⁵⁰ D. MOYNIHAN, *supra* note 32, at 135.

⁵¹ *Gangs Selling Crack Give Rise to New Wild West*, N. Y. Times, June 21, 1988, at 11, col. xx.

⁵² D. MOYNIHAN, *supra* note 32, at 168.

⁵³ W. WILSON, *supra* note 27, at 43.

⁵⁴ See, e.g., W. WILSON, *THE TRULY DISADVANTAGED* (1987).

alliance with the black middle class, which has left the ghettos and housing projects, or with the black elderly, most of whom have escaped poverty with the help of Social Security.⁵⁵

III. JUDICIAL RELUCTANCE TO AID POOR CHILDREN

Diluted equal protection should be provided to members of groups that are innocent, suffering, and presently receiving inadequate judicial protection. The prior section demonstrated the wide-spread anguish of innocent, poor children. This section shall examine the extent of constitutional protection they currently receive from the Supreme Court. The Constitutional history of the poor has been one of dashed hopes, the greatest of which was that the court might someday find the poor to be a protected "discrete and insular minority" under footnote four of *Carolene Products*.⁵⁶ Initially favorable rulings for the poor quickly become isolated episodes, limited to their facts.

When the Court first considered the constitutional rights of the poor, it sympathized with indigents.⁵⁷ In *Edwards v. California*,⁵⁸ Justice Jackson criticized the wealth discrimination contained in a state law making it a crime to intentionally bring a poor person into the state: "We should say now, and in no uncertain terms, that a man's mere property status, without more, cannot be used by a state to test, qualify, or limit his rights as a citizen of the United States The mere state of being without funds is a neutral fact — constitutionally an irrelevance, like race, creed, or color."⁵⁹ But even Jackson's statement has limits. If poverty is irrelevant to constitutional rights, then no constitutional right exists to be free from poverty or its effects.

Chief Justice Warren wrote in a voting rights case that wealth and race are "two factors which independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny."⁶⁰ In the course of striking down a state poll tax in *Harper v. Virginia Board of Elections*, Justice Douglas stated: "Lines drawn on the basis of wealth or poverty, like those of race . . . are traditionally disfavored."⁶¹ This serious

⁵⁵ There are four times more black poor children than black poor elderly. D. MOYNIHAN, *supra* note 32, at 97. In fact, the overall percentage of poor old people has dropped from 35.2 percent in 1959 to 12.4 percent in 1984, evidence that transfer payments can reduce or even eliminate poverty. Edelman, *supra* note 25, at 11.

⁵⁶ 304 U.S. 144, 152 n.4 (1938) (Jackson, J., concurring).

⁵⁷ This discussion of indigents' rights relies heavily upon Lawrence Tribe's recent treatise, which provides a full analysis, L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1625-1672 (2nd ed. 1988) [hereinafter L. TRIBE, *CONSTITUTIONAL LAW*].

⁵⁸ 314 U.S. 160 (1941).

⁵⁹ *Id.* at 184-85.

⁶⁰ McDonald v. Board of Election Commissioners of Chicago, 394 U.S. 802, 807 (1969) (dictum).

⁶¹ 383 U.S. 663, 668 (1966).

scrutiny was not limited to statutes that discriminated against the poor by charging a fee to engage in the constitutional right to vote (or to obtain a divorce as in *Boddie v. Connecticut*⁶²). In a series of cases, the Court ordered the state to pay certain costs of criminal litigation (including attorneys' fees⁶³), as well as to pay for welfare⁶⁴ and to finance non-emergency medical care⁶⁵ for indigents who had recently become state residents. Particularly heartening was Justice Brennan's dictum in *Shapiro*: "On the basis of this sole difference [residency] the first class is granted and the second class is denied welfare aid upon which may depend the ability of families to obtain the very means to subsist - food, shelter, and other necessities of life"⁶⁶ As Justice Harlan pointed out in his dissent, Brennan may have been laying the groundwork for a "fundamental right" to "necessities of life."⁶⁷

A. Suspect Class Analysis

Any hope that these cases would lead to significant protection for the poor faded. With a few exceptions, such as finding unconstitutional a state law requiring judicial approval of marriage of parents who have court-ordered support responsibilities,⁶⁸ the Burger Court refused to expand the constitutional rights of the poor. A poor person did not have to pay filing fees for a divorce,⁶⁹ but had to pay a fifty dollar fee to obtain a bankruptcy⁷⁰ and a twenty-five dollar fee to appeal an administrative reduction in old-age assistance.⁷¹ An indigent criminal had a constitutional right to resources for appeals of right,⁷² but not for discretionary appeals or for filing applications to the United States Supreme Court.⁷³ In all the other cases striking down a wealth-based regulation some other constitutional interest was also at stake; the Court arguably was only eliminating unconstitutional conditions to pre-existing rights or to discretionary benefits.⁷⁴ Thus *Edwards*, *Shapiro*, and *Maricopa County* became "right to travel" cases. Procedural Due Process concerns could

⁶² 401 U.S. 371 (1971).

⁶³ See *Gideon v. Wainwright*, 372 U.S. 335 (1963); see also *Powell v. Alabama*, 287 U.S. 45 (1932).

⁶⁴ *Shapiro v. Thompson*, 394 U.S. 618 (1969).

⁶⁵ *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974).

⁶⁶ 394 U.S. at 627.

⁶⁷ 394 U.S. at 661 (Harlan, J., dissenting).

⁶⁸ *Zablocki v. Redhail*, 434 U.S. 374 (1978). Both *Zablocki* and *Boddie v. Connecticut*, 401 U.S. 371 (1971), involve the fundamental right to marry, protected by the due process clause.

⁶⁹ *Boddie v. Connecticut*, 401 U.S. 371 (1971).

⁷⁰ *United States v. Kras*, 409 U.S. 434 (1973).

⁷¹ *Ortwein v. Schwab*, 410 U.S. 656 (1973) (per curiam).

⁷² See *Griffin v. Illinois*, 351 U.S. 12 (1956); *Douglas v. California*, 372 U.S. 353 (1963).

⁷³ *Ross v. Moffitt*, 417 U.S. 600 (1974).

⁷⁴ See L. TRIBE, CONSTITUTIONAL LAW, *supra* note 55, at 781.

independently explain providing assets to criminal defendants and prohibiting states' conditioning the length of confinement on the ability to pay a fine.⁷⁵ The Court considers the right to vote the cornerstone of all other constitutional rights; indeed, the Court in *Harper* struck down the poll tax as applied to all citizens, not just to indigents.⁷⁶

This counterattack did not just narrow precedents and ignore dicta. The Court made it clear that the poor were not a "suspect class," and that poverty usually was not a "suspect classification" in *Ortwein v. Schwab*,⁷⁷ which clarified *Dandridge v. Williams*.⁷⁸ The *Dandridge* Court had applied the highly deferential rational basis test to uphold a statute setting a limit to the amount of financial assistance a family could receive, thereby preventing larger families from receiving any additional help even though Congress and the state had computed that they needed more. The *Dandridge* Court first noted that no constitutional right was affected. Nor was there any identifiable suspect class; "the myriad of potential recipients" who might claim relief presented such a mixture of groups within the poor that the Court could see no way to determine which subgroups deserved special judicial protection.⁷⁹

The Court has not limited its deference to laws that injure the poor financially. States could pass statutes that facially isolate and politically weaken the poor. The Court decided in *James v. Valtierra*⁸⁰ that a state could amend its constitution to prevent the construction of low-rent housing projects unless those projects were approved by a majority of voters in the relevant state public body, even though the Court previously held that states could not establish similar procedures that hindered the creation of anti-discrimination housing laws in *Hunter v. Erickson*.⁸¹ Race, but not wealth, triggers heightened scrutiny. The inspiring rhetoric of *Edwards* had disappeared; states could make poverty a relevant disabling characteristic.⁸²

Having refused to evaluate statutes that either deprived the poor of needed funds or that overtly put the poor in a politically weak posture, the Court predictably extended its deference to laws having a particularly severe adverse impact on the poor. In *Selective Service System v. Minnesota Public Interest Research Group*⁸³ the plaintiffs argued that a congressional law, which denied financial aid to any students who did not register for

⁷⁵ See *Williams v. Illinois*, 399 U.S. 235 (1970); *Tate v. Short*, 401 U.S. 395 (1971).

⁷⁶ *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966).

⁷⁷ 410 U.S. 656, 660 (1973).

⁷⁸ 397 U.S. 471, 484 (1970).

⁷⁹ See *id.* at 487.

⁸⁰ 402 U.S. 137 (1971).

⁸¹ 393 U.S. 385 (1969).

⁸² States also could enforce laws that arguably perpetuate such stigmatic stereotypes about the poor as their alleged unwillingness to seek employment. See *New York State Dep't of Social Services v. Dublino*, 413 U.S. 405, 431-32 (1973) (Marshall, J., dissenting) (decided on preemption grounds).

⁸³ 468 U.S. 841 (1984).

the draft, discriminated against the poor. Although Chief Justice Burger, like Anatole France, was certainly correct in observing that the law treats both rich and poor equally, "denying aid to both the poor and the wealthy,"⁸⁴ he ignored the fact that only the poor and relatively poor would be affected by the law. He never responded to Justice Marshall's dissenting observation that the rich are rarely eligible for financial aid.⁸⁵ That same year the Court rejected a First Amendment attack against a law banning the posting of election signs on public property, even though putting signs on telephone poles might be the only feasible campaign tool for the poor.⁸⁶ The *Kadrmas* Court reaffirmed such reasoning in the course of upholding a school bus fee that burdened poor families and children: "We have previously rejected the suggestion that statutes having different effects on wealthy and the poor should on that account alone be subjected to strict equal protection scrutiny."⁸⁷

The Court has rejected the argument that discrimination against the poor may be a pretext for racism against blacks since so many blacks are poor. In *Jefferson v. Hackney*,⁸⁸ Justice Rehnquist held that black welfare mothers (and their children) cannot successfully challenge a state law that distributed more welfare benefits per capita to disabled and aged people than it did to AFDC recipients, even though AFDC had a higher percentage of blacks.⁸⁹ The State could choose to allocate scarce resources among competing groups as it saw fit, even though those allocations might, in the aggregate, favor whites more than blacks. Justice Rehnquist separated race from wealth, even though most policies that discriminate against the poor will disproportionately injure blacks since a higher percentage of blacks are poor.

The Court's refusal to consider the poor to be a "discrete and insular minority" under footnote four of *Carolene Products* generates two criticisms. Either the test itself is insufficient, or the Court failed to use properly the *Carolene Products* test.⁹⁰ For example, Professor Ackerman has pointed out that members of groups like the poor and homosexuals do not really fit under the adjectives "discrete" or "insular," yet they need equal protection assistance.⁹¹ One cannot immediately identify the poor

⁸⁴ *Id.* at 859 n. 17.

⁸⁵ *Id.* at 862 (Marshall, J., dissenting).

⁸⁶ *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

⁸⁷ 108 S.Ct. at 2487.

⁸⁸ 406 U.S. 535 (1972).

⁸⁹ 406 U.S. 535, 545 (1972).

⁹⁰ Given the judicial tolerance of facial discriminations, overt deprivations and foreseeable side effects of laws that injure the poor, one should not be surprised that the Court never had to reach the more vexing problems of state toleration of poverty. The Court never considered how the common law, existing public law, the allocation of resources via governmental budgets, the market and the private sphere all combine to oppress the poor.

⁹¹ Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985); see also Brilmayer, *Carolene, Conflicts and the Fate of the 'Insider-Outsider'*, 134 U. PA. L. REV. 1291 (1986).

or the gay by looking at them. However, failure to meet the *Carolene Products* test should not end the inquiry; the Court has not relied exclusively upon the test. Professor Ely noted that women receive heightened scrutiny even though they are not discrete, insular, or a minority.⁹² Thus the Court should follow its own lead in the sex discrimination cases to expand equal protection beyond the *Carolene Product's* test. In the alternative, the Court could have held that the poor are the archetype "discrete and insular minority": victims of centuries of class conflict, oppression, and isolation.

B. Fundamental Rights Analysis

The Court's unwillingness to find poverty a suspect classification or the poor to be a suspect class in *Ortwein v. Schwab* did not end the constitutional struggle. The Court has an additional doctrinal tool which it could have used to aid the poor. It could have relied upon *Shapiro* to hold that certain necessities were "fundamental rights" protected by substantive equal protection, thereby placing a duty on the state to provide enough relief to satisfy those needs. The Supreme Court, however, has decided that poor people do not have fundamental rights to food,⁹³ shelter,⁹⁴ education,⁹⁵ welfare,⁹⁶ or medical care.⁹⁷ Additionally, a prior judicial finding of a fundamental right, such as the right to have an abortion, does not trigger a state obligation to support that right with public finances.⁹⁸

Justice Brennan's apparent effort to provide "basic necessities" to the poor in *Shapiro v. Thompson* thus seemed to be a false start until he obtained four additional votes in *Plyler v. Doe*⁹⁹ to overturn a state law preventing the children of illegal aliens from attending public schools. Justice Brennan conceded that education is not a "fundamental right," but replied that education performs a "fundamental role in maintaining the fabric of our society."¹⁰⁰ Without putting the children of illegal aliens into a suspect classification, Brennan criticized the law for improperly burdening this group of children: "[T]he children who are plaintiffs in these cases 'can affect neither their parents' conduct nor their own status Even if the State found it expedient to control the conduct of adults

⁹² The Court was appropriately more concerned about actual prior treatment of women and the dehumanizing effect of being injured because of one's sex than it was about footnote four.

⁹³ See *Lyng v. International Union, UAW*, 108 S.Ct. 1184 (1988).

⁹⁴ *Ortwein v. Schwab*, 410 U.S. 656 (1973).

⁹⁵ *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

⁹⁶ *Dandridge v. Williams*, 397 U.S. 471 (1970).

⁹⁷ *Maher v. Roe*, 432 U.S. 464 (1977).

⁹⁸ *Id.*

⁹⁹ 457 U.S. 202 (1982). For a critical reaction, see Hutchinson, *More Substantive Equal Protection? A Note on Plyler v. Doe*, 1982 SUP. CT. REV. 167.

¹⁰⁰ 457 U.S. at 221.

by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice"¹⁰¹ Brennan intensified judicial scrutiny by combining the theme of individual innocence with the suspect state action of totally depriving those innocent people of something both they and society vitally need.

Brennan distinguished *San Antonio School District v. Rodriguez*, which had held that children in poor school districts had no constitutional right to equal funding with children in wealthy districts because education is not a fundamental right, on the ground that the *Rodriguez* plaintiffs were not being totally deprived of an education, but the *Plyler* plaintiffs were prohibited from receiving any public education. Justice Powell, who concurred in *Plyler*, had stated in his *Rodriguez* opinion that the unequal tax system did not completely deprive anyone of an education, nor had the system failed "to provide each child with an opportunity to acquire the *basic minimal skills* necessary for the enjoyment of the rights of speech and of full participation in the political process."¹⁰² Thus, Powell was willing to side with Brennan when the state law prevented the children from receiving any public education in *Plyler*.

The "total deprivation" and "basic minimal skills" concepts have hopeful connotations in terms of more basic needs such as food and shelter, but the current Supreme Court will not extend its heightened scrutiny beyond education. Even Marshall and Brennan (albeit in an effort to distinguish precedent with which they did not initially agree)¹⁰³ stated in *Rodriguez*: "the close nexus between education and our established constitutional values with respect to freedom of speech and participation in the political process makes this a different case from our prior decisions concerning discrimination affecting public welfare and housing"¹⁰⁴ Their distinction makes little sense. A person is very unlikely to get a decent education or to participate in the political process if he or she is very hungry and/or in physical discomfort due to lack of clothing, housing or medical care. Furthermore, as shall be discussed below, the Court will be far less willing to examine financial discrimination in education after *Kadrmas v. Dickinson School District*. The complete deprivation concept is also too weak. Does the state satisfy *Plyler* if it offers special courses to children of illegal aliens once a week?¹⁰⁵

The fundamental rights analysis is preferable to the "suspicion" themes because it focuses more directly on both the universality and the nature

¹⁰¹ *Id.* at 220.

¹⁰² 411 U.S. 1, 37 (1973) (emphasis added).

¹⁰³ *Id.* at 98. (Marshall, J., dissenting).

¹⁰⁴ *Id.* at 115 n.74.

¹⁰⁵ The Court can avoid this problem by requiring the state to provide the same education as it provides everyone else. Of course that maneuver does not resolve what constitutes the "same education." The state is arguably providing the "same education" to everyone when it charges everyone the same fees. See *Kadrmas v. Dickinson School District*, 108 S.Ct. 2481 (1988).

of poor people's "rights" and needs, and thus on potential remedies. For instance, the Court could protect a "fundamental need" for food, clothing, education, shelter and medical care by establishing a minimum somewhere above complete deprivation.¹⁰⁶ If the Court requires that the state avoid complete deprivations and meet minimal needs, it does not have to reject the market place or the state's use of pricing mechanisms in other contexts (such as charging tuition to attend state universities). The fundamental needs analysis also tends to avoid blaming the states and/or the market. The Court does not have to decide if the poor have been viciously treated; they deserve basic needs because of their humanity and their dignity. But in all other respects, re-expanding fundamental rights raises the same underlying problems that led the Court to refuse to find the poor to be a "suspect class" or poverty to be a "suspect classification." The Court must still worry about political reactions, remedial difficulties and accusations of illegitimacy.

The Supreme Court may have eliminated those anxieties in *Kadrmas v. Dickinson School District*,¹⁰⁷ which exploited upon *Plyler*'s limitations. The majority, which contained Powell's replacement, Justice Kennedy, relied upon Burger's *Plyer* dissent and Powell's *Plyler* concurrence to characterize *Plyler* as "unique."¹⁰⁸ The Court noted that the *Kadrmas* plaintiffs' children were not being prevented from going to school; the children were not being penalized for their parents' illegal behavior; and the state's policy was unlikely to create a "sub-class of illiterates."¹⁰⁹ Indigent school-children, who were not members of any "suspect class", had no fundamental right to education,¹¹⁰ and had no constitutional claim on the ground that the policy would hurt them more than less impoverished children.¹¹¹ Not only was *Plyler* limited to its facts, but also its reasoning was equally reduced. Admittedly, even after *Kadrmas*, the state cannot bar students from an existing classroom; that much of *Plyler* remains. But the state can charge large fees that will effectively prevent many students from attending school and will create a sub-class of illiterate, uneducated people. Underlying the Court's reasoning is a cheerful view of market mechanisms; nobody is "prevented" from doing or having something because they cannot afford it. Apparently the state is not at fault for charging families fees to send their children to school; the families are at fault for not having the money.

¹⁰⁶ The "complete deprivation" is a particularly easy tool for the judiciary to administer. The Court simply determines if the state is barring the plaintiff from any relief. The test, however, is insufficient, failing to address "significant deprivation"—when the state provides some resources to meet fundamental needs, but does not provide sufficient resources.

¹⁰⁷ 108 S.Ct. 2481 (1988).

¹⁰⁸ 108 S.Ct. at 2488.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 2487.

¹¹¹ *Id.*

The Court distinguished prior cases requiring the states to sometimes provide judicial resources to indigents on the theory that the state had a monopoly over the judiciary.¹¹² Even if one assumes that distinction is constitutionally relevant, it seemed applicable in this case; all children are legally required to attend school. Thus the Court has placed poor families in a dilemma. They must either try to pay bus fees they cannot afford or they must break a law they desperately want to comply with. The Court also tried to minimize the case's impact because the fee represented a low percentage of the service and was waivable. Yet there is nothing in the opinion that prevents the state from charging the families for the full cost of the service, a charge that would exceed a thousand dollars. Nor was there any indication in the record that the fee will be waived by the State.¹¹³

The implications of the Court's reasoning were even more disturbing than its final decision: "The Constitution does not require that such service be required at all, and it is difficult to imagine why choosing to offer the service should entail a constitutional obligation to offer it for free."¹¹⁴ States can now probably charge a general fee for education if they so choose, since they are under no federal constitutional obligation to provide education, which is not a "fundamental right." One might try to argue that the Court's reasoning only applied to "optional services" such as providing school buses; the Court held that the State's "rational purpose" was charging for "optional services" for the purpose of expanding their coverage.¹¹⁵ However, according to the Court, education itself is an "optional service" since it is not constitutionally required, not a fundamental right and not deserving rigorous scrutiny. The State may not be able to deprive overtly a poor child of his or her education, but it now may make that education inaccessible for the child of a poor family.

The last remaining avenue for poor people was also closed in the 1988 Term. In 1973, the Court held in *Department of Agriculture v. Moreno* that Congress could not limit food stamps in a household to those related to each other.¹¹⁶ The Court seemed to give special weight to the basic need for food, and to the fact that Congress apparently was punishing certain unpopular groups, "hippie" families. The case was unusual because the Court utilized the rational basis test, which normally is highly deferential, to strike down a Congressional plan. The Court radically limited *Moreno* in *Lyng v. Castillo*, which held that Congress could limit the family unit eligible for foodstamps to parents, siblings, and children who live together, and could exclude more distant relatives.¹¹⁷ The Court

¹¹² *Id.* at 4780.

¹¹³ *Kadrmas* also highlights the different judicial treatment accorded to some black children. Black children have a right to free school bus trips to help desegregate schools, but poor children, many of whom are black, have no right to get a free bus trip to attend any school.

¹¹⁴ 108 S.Ct. at 2489.

¹¹⁵ *Id.*

¹¹⁶ *Department of Agric. v. Moreno*, 413 U.S. 528 (1973).

¹¹⁷ 477 U.S. 635 (1986).

completed the process when it held that Congress could bar foodstamps to families any time a member of that family is on strike in *Lyng v. International Union, UAW*.¹¹⁸ Hunger is a constitutionally valid political weapon.

C. Poor Children as a Suspect Class

Given its unwillingness to help the poor, it is not surprising to learn that the Court has found that discrimination against the young does not warrant intensified judicial scrutiny. The young are easily distinguishable from the rest of us; they are "discrete." Children are more innocent and more vulnerable than the rest of us. They have little direct political power since they cannot vote, but the Court has never held that they are a "discrete and insular minority" suffering from a history of oppression. After all, all the oppressors and the oppressed, the majorities and the minorities, were once children. Furthermore, the Court has constitutionalized the lesser status of children. Children can be spanked in schools without a prior hearing;¹¹⁹ they can be placed in mental institutions without any hearing;¹²⁰ and they have no First Amendment rights when they write for a school newspaper.¹²¹ Such judicial paternalism has not always generated unsympathetic results. The Court has sometimes been more skeptical of legislation that injures the young for reasons beyond their control. In *Mathews v. Lucas*,¹²² for example, the Court decided to increase its scrutiny of statutes that disadvantaged illegitimate children because illegitimacy is beyond the individual's control, bearing "no relation to the individual's ability to participate in and contribute to society."¹²³ Similarly, the *Plyler* Court voided a statute that prohibited the children of illegal aliens from attending public schools.

One might respond that poor children, who suffer both from the physical deprivation of poverty and the political impotence of youth, constitute a unique "discrete and insular minority." The two disabilities have a cumulative impact that requires the Court to intervene, even though the Court will not protect individuals suffering from problems caused by having only one of those characteristics. This argument is not merely rhetorical. Over the past twenty years, poor children have been receiving a smaller share of the gross national product. And as noted earlier in this Article, poor children are becoming more socially isolated from the rest of us. This argument also partially escapes existing unfriendly precedent. The goal is not to constitutionalize the rights of all the poor, some of

¹¹⁸ *Lyng v. International Union, UAW*, 108 S. Ct. 1184 (1988).

¹¹⁹ *Ingraham v. Wright*, 430 U.S. 651 (1977).

¹²⁰ *Parham v. J. R.*, 442 U.S. 584 (1979).

¹²¹ *Hazelwood School Dist. v. Kuhlmeier*, 108 S.Ct. 562 (1988).

¹²² 427 U.S. 495 (1976).

¹²³ *Id.* at 505. Of course, poverty is also beyond a child's control.

whom may be partially or even primarily responsible for their fate, but to protect that subclass of the poor which is wholly irresponsible for its misery—poor children.

A majority of the Court would probably reply that poor children do not suffer from permanent discrimination caused by immutable and inescapable traits such as sex or race, traits that have been previously used both to stigmatize and to dominate. Although many poor youth will not be able to hide the fact of either their youth or their poverty, they do not carry both of those badges with them for the rest of their lives. Many poor children leave both their youth and their poverty behind. Nor are they completely “insular.” They benefit from the efforts of wealthy and middle class parents to raise their own children, since those groups do not want to see children, as a class, be totally crushed. Of course, such hopes have diminished after the Court, in *Milliken v. Bradley*¹²⁴ and *Arlington Heights v. Metropolitan Housing Corp.*¹²⁵ allowed the more wealthy to segregate themselves from the poor and to educate their children in either suburban or private schools. For precedential support, a hostile Supreme Court majority would return to *Jefferson v. Hackney*,¹²⁶ which upheld a state welfare program that paid out substantially more to the aged and disabled than to poor mothers and children even though the latter group had far more blacks in it; to *Dandridge v. Williams*,¹²⁷ which did not require the state to provide additional help for additional children, and to *Kadrmas v. Dickinson School District*,¹²⁸ which upheld charging school bus fees to indigent school children.

IV. THE VALUE STRUGGLE UNDERLYING THE COURT'S RELUCTANCE TO HELP THE POOR

Even a cursory examination of present equal protection doctrine reveals its political content. The “suspect class” and “suspect classification” methodologies search for improper state motives. A group or class of people become suspect because they have been persecuted by the majority. A classification becomes suspect because it has been used by the majority to oppress people, usually by deindividualizing them.¹²⁹ The Court must

¹²⁴ 418 U.S. 717 (1974).

¹²⁵ 429 U.S. 252 (1977).

¹²⁶ 406 U.S. 535 (1972).

¹²⁷ 397 U.S. 471 (1970).

¹²⁸ 108 S.Ct. 2481 (1988).

¹²⁹ For example, the Court will consider an American Indian's claim that he or she was discriminated against for being a member of a relatively powerless ethnic group, a “suspect class.” Yet the Court will also review a white male's challenge to laws that discriminate on the basis of sex even though the plaintiff is not a member of a powerless minority; sex is a “suspect classification” because prior legislative majorities have frequently used it to perpetuate inappropriate stereotypes. If the plaintiffs fail to fit under either of these tests, the Court will apply the “rational purpose” test, which usually consists of rubber stamping the government's action.

turn to history to determine which groups have been disadvantaged and to ascertain which classifications have often been used inappropriately to injure innocent people. This search for a bad actor or a bad belief, tainted by history, has undercut the poor's position before the Court. Historical interpretations of poverty reflect such underlying political ideologies as conservatism, modern liberalism, democratic socialism, or Marxism. For instance, if one believes that class conflict has been a more consistent, widespread, and intractable phenomenon than either racial oppression or sexual conflict, one might well conclude that poor people are the group, the class, that American society has treated most harshly. Poverty should be one of the most "suspect classes."

The existing Court has been unwilling to find such evil motives in our society. It refuses to conclude that poverty is caused in part by intentional choice or by governmental ill-will, even though poverty could be completely eliminated in this country by transferring one ninth of the defense budget to welfare programs.¹³⁰ There are several reasons why the Court has not protected the poor as much as blacks or women, even though a huge overlap exists between the groups. Wealth distinctions, unlike racial or sexual distinctions, have served and continue to serve many purposes that most Americans consider legitimate. Wealth has historically been the most significant criteria in determining power and status. Unequal distributions of wealth are the inevitable and even desirable outcomes of a market system, which is designed to provide the twin benefits of increasing overall income and of distracting people from more contentious issues.¹³¹ One can conclude that the poor deserve far less constitutional

The distinction between "suspect classes" and "suspect classifications" is frequently unclear. A black plaintiff may challenge a statute making racial distinctions both because it injures blacks, a historically disadvantaged group, and because it uses an inherently suspicious and generally irrelevant criteria, race. The emphasis in "suspect class" analysis is on protecting unfairly treated groups, while the primary objective of "suspect classification" scrutiny is to protect individuals from being discriminated against for either improper or irrelevant reasons. In other words, "suspect class" analysis tends to lead to group rights, while "suspect classification" analysis is premised on individual rights. This distinction is particularly ambiguous when applied to the poor, if only because the judicial result will be similar under either approach. Whether one considers poverty to be a manifestation of group politics or a derogation of an individual's rights via vicious stereotypes, usually the only meaningful judicial remedy is money.

¹³⁰ Harpers Magazine, *Harper's Index* 15 (6-88, Vol. 276, #1657). The Senate recently passed a \$157 billion bail-out of the savings and loans industry, *Savings Bill is Cleared By Senate*, N.Y. Times (4-20-89), page 25, col. 6. That gigantic amount, which will need to be increased over the years, is one third of the estimated \$46.6 billion per year currently needed to bring all of America's poor up to the poverty line in terms of cash benefits, Edelman, *supra* note 25, at 50 n. 189. In short, our society is willing and able to make huge transfer payments when it perceives a serious problem.

For a historical review of welfare in America, see M. KATZ, IN THE SHADOW OF THE POOR HOUSE (1986). Katz concluded: "In a nation as smart, inventive, and rich as America, the continuation of poverty is a choice, not a necessity." *Id.* at 291.

¹³¹ See Berns, *Judicial Review and the Rights and Laws of Nature*, 1982 SUP. CT. REV. 49 (1982).

protection than women or blacks, who were legally prevented from effectively participating in the market for reasons totally beyond their control: the immutable traits of sex and skin color. Arguably the poor, as a group, have faced no arbitrary barriers; they have had the same opportunity to succeed in the marketplace as the rich, but they have been injured primarily through their own actions or inactions. Indeed, many people escape poverty every generation, while others who were once economically comfortable become destitute. In short, according to this argument, the poor have not been discriminated against for reasons unrelated to their behavior; they are not innocent victims of malicious stereotypes or systematic exploitation, but are suffering for their own faults. The reason they are poor is that they have little to offer others through the market.

Such thinking coincides with conservative antipathy to welfare. Conservatives are generally reluctant to support welfare transfer payments because such transfers disturb the presumptively valid legal universe created by the common law; because such funds go from the "deserving" to the "undeserving"; because welfare payments are counter-productive by reallocating resources from capital to consumption, thereby diminishing overall wealth at the ultimate expense of the poor; because such payments demoralize the poor; and/or because such transfers undermine the power of the wealthier classes. Such fundamental political hostility to wealth transfers is reinforced by theories of judicial restraint, based upon concerns about judicial competence and/or separation of powers.

Even if a majority of the Justices suddenly became politically predisposed to helping poor children, and were willing to work around existing precedent, that majority would face a variety of institutional limitations. Although the judicial regulation of poverty is not a nonjusticiable political question, judicial intervention would trigger many of the same anxieties that underlie the political question doctrine.¹³² Discrimination against the poor, by definition, revolves around lack of money. Consequently, in virtually every case the Court would have to reallocate resources to alleviate the problem. The Court is wary of reallocating resources because that remedy smacks of legislation, threatening separation of powers principles. After all, the Constitution textually requires that all bills for appropriations and for taxation originate in the House of Representa-

¹³² The Court has set out a multi-prong test to determine if an issue is non-justiciable:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962).

tives.¹³³ As James Madison explained in *The Federalist Papers*, "the legislative department alone has access to the pockets of the people."¹³⁴ The Court's primary role is to set limits on governmental action, not to redistribute resources. The Supreme Court cannot as easily and as inexpensively remove a clause from a statute or state action that injures the poor as it can when reviewing laws drawn on racial or sexual lines. For example, most racist statutes can be cured simply by eliminating the offensive language,¹³⁵ but the primary remedy for most forms of wealth discrimination is a transfer of money or services.

The Court is becoming increasingly wary of finding constitutional rights not clearly based in the text and history of the Constitution. Moving beyond text and history tends to substitute the views of nine judges for the presumptively valid will of the majority: "The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."¹³⁶ Although "equal" is a notoriously ambiguous adjective that could handle wealth transfers, and "equal protection" implies relief beyond "equal rights," nobody is arguing that the Framers of the fourteenth amendment thought that their Amendment would require massive wealth transfers. The text may be willing, but the history is weak.

The Court may also be wary of the political backlash of aiding poor people, just as it apparently was when it refused to extend busing and public housing into the suburbs.¹³⁷ A twenty billion dollar injunction¹³⁸ transferring wealth from one segment of the population to another would almost certainly provoke public outrage and charges of "taxation without representation" that could cripple the Court in fulfilling its other duties. The Court has often been wary to act when the consequences of judicial action are controversial, momentous and unpredictable.¹³⁹

¹³³ U.S. CONST. art.I, § 7.

¹³⁴ THE FEDERALIST NO. 48, 310 (J. Madison) (C. Rossiter, ed., 1961).

¹³⁵ The invalidation of some discriminatory statutes did have financial overtones. Professor Simon observed that several of the Supreme Court cases finding sex discrimination in Social Security cases not only redistributed money from one sex to the other, but also from one group to another within each sex. Simon, *Rights and Redistribution in the Welfare System*, 38 STAN. L. REV. 1477-86 (1986).

¹³⁶ *Bowers v. Hardwick*, 478 U.S. 186, 199 (1986).

¹³⁷ See *Milliken v. Bradley*, 433 U.S. 267 (1977); *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977).

¹³⁸ Gary Burtless referred to a study indicating that it would cost \$11.9 billion (1984 dollars) to implement a program that would eliminate poverty for husband-wife families and single-parent families with children. The plan would meet the poverty line, taxing earnings at a seventy percent rate and unearned income at a 100 percent rate. Burtless, *Public Spending for the Poor: Trends, Prospects, and Economic Limits* 43, in FIGHTING POVERTY: WHAT WORKS AND WHAT DOESN'T, (S. Danziger and D. Weinberg, eds., 1986) [hereinafter FIGHTING POVERTY].

¹³⁹ See *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849). The Court's initial avoidance of the slavery issue, followed by its ultimately disastrous resolution in *Dred Scott*, provide classic examples of the perils of judicial involvement in fundamental political disputes, see *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). See, e.g., R. COVER, JUSTICE ACCUSED (1975).

Furthermore, the state's actions which most disadvantage the poor have been to tolerate and to encourage the workings of the market. The governments' constitutional sins frequently have been of omission, not commission. Most state actions do not overtly discriminate against the poor by expressly injuring them; the state just prices the poor out of the market, either directly (through charging fees), in conjunction with the market (by requiring five acre home lots, for example), or by not helping them affirmatively. Thus the scope of the inquiry becomes simultaneously very broad and very indeterminate. Is the market mechanism unconstitutional? Is the state's use of the market mechanism always unconstitutional? For instance, can the state never charge fees for services because all fees fall more heavily upon the poor? Has the government acted unequally when it has distributed most of its transfer payments and tax breaks to the corporations and to the middle class instead of the poor?

Implementation problems reinforce these arguments in favor of judicial restraint. It is hard to design an ongoing remedy which is so contingent upon shifting empirical data. Assuming that the state is not totally depriving a group of people of any fundamental need, how much more must a state provide? Must the Court fulfill the Rawlsian requirement of "just needs?"¹⁴⁰ Must it only eliminate absolute poverty (whatever that means) or must it also alleviate relative poverty? In other words, can the Court only prevent starvation, or must it eliminate malnutrition or even a poor diet? How is a Court to determine the level of payments when there is a recession or when there is inflation? Must the remedy reflect the different costs of living in different parts of the country? How can a Court determine the appropriate mix of cash and non-cash benefits?

The Court will also have to overcome two policy arguments against increasing welfare payments to poor children. Charles Murray has argued that welfare increases and perpetuates poverty; welfare should be eliminated, not increased.¹⁴¹ Even if one does not accept that analysis, one has to recognize that increasing welfare benefits creates disincentives to work at low-paying jobs. Millions of Americans who work do not earn enough to escape poverty. Raising the level for the non-working poor requires the formulation of a sliding scale for the working poor to create incentives to keep working. Courts are poorly designed to respond to such perpetually changing factors.

V. THE LEGAL ACADEMIC RESPONSE TO POVERTY

The Court's debate over what aid, if any, to give to the poor has echoed into the legal academy. Perhaps surprisingly, if one were to take nine leading constitutional scholars who represent the traditional liberal-con-

¹⁴⁰ J. RAWLS, *A THEORY OF JUSTICE* (1971).

¹⁴¹ C. MURRAY, *LOSING GROUND*

servative spectrum, one would discover little more hope for the poor than one finds on the existing Supreme Court. Conservative academics generally oppose judicial wealth transfers for a combination of political and institutional reasons, while most liberal law professors limit intervention to improvements in process or structure. The reinforcing themes of judicial incompetence and deference to the elected branches have prevailed over the cries of the poor.

Inspired by John Rawls' *A Theory of Justice*,¹⁴² Professor Michelman proposed that the Court engage in significant wealth re-allocation under the fourteenth amendment.¹⁴³ Rawls had argued that if everyone had to formulate a society behind a "veil of ignorance" which prevented them from knowing their future individual fate, they would agree to live by the "Difference Principle," which tolerates only those economic inequalities that ultimately benefit the worse-off groups in society. Everyone would thus have best insured himself against such disasters as being born poor or becoming disabled. Michelman proposed that Rawls' scheme of distributive justice become part of equal protection doctrine. An affluent society like America should at least satisfy the basic needs of all persons.

Before becoming federal appellate judges, Judge Winter and ex-Judge Bork led the conservative counterattack. Judge Winter presented a series of complaints against using the equal protection clause to redistribute wealth. Transferring wealth to poor people distorts the market, which would be counterproductive in the long run for the poor because their best hope lies in greater overall prosperity.¹⁴⁴ Egalitarian ideals become distorted by political pressures; the welfare impulse will end up benefiting intermediaries and politically powerful special interest groups.¹⁴⁵

Winter did not limit his criticisms to policy objections. Using equal protection to aid the poor would be improper lawmaking, reviving the subjective techniques used by the *Lochner* court in the discredited era of economic substantive due process. Such doctrine also conflicts with the text and the Framers' intentions: "[I]t not only finds no support in the language or discernable purpose of the Equal Protection Clause but fairly flies in their face."¹⁴⁶ Even if the Court had stronger textual-historical justifications, it would become entangled in remedial problems.¹⁴⁷ There is no consensus over which wants are "just wants"; the real battle is over

¹⁴² J. RAWLS, *A THEORY OF JUSTICE* (1971).

¹⁴³ See, e.g., Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U.L.Q. 659 (1979); *Foreword: On Protecting the Poor through the fourteenth amendment*, 83 HARV. L. REV. 7 (1969); *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 692 (1973).

¹⁴⁴ Winter, *Changing Concepts of Equality: From Equality Before the Law to the Welfare State*, 1979 WASH. U.L.Q. 741, 753-54 (1979) [hereinafter Winter].

¹⁴⁵ *Id.* at 748-49.

¹⁴⁶ Winter, *Poverty, Equality, and the Equal Protection Clause*, 1972 SUP. CT. REV. 41, 43 (1972).

¹⁴⁷ *Id.* at 70-71.

relative deprivation, not complete deprivation. The Court would have a great deal of difficulty managing its welfare system.¹⁴⁸

The liberal reply, at least as seen in the two of the most important constitutional works of the 1980s, Professor Ely's *Democracy and Distrust*¹⁴⁹ and Professor Tribe's second edition of *American Constitutional Law*,¹⁵⁰ has been restrained. Both scholars commence with approaches that might lead to judicial aid for the poor, but hedge when faced with actually making substantive commitments. Professor Ely made "representation reinforcement" his constitutional lodestone; the court should only try to facilitate the democratic process. "Representation reinforcement" both explained and limited the Court's famous contemporary exposition of the scope of judicial review expressed in footnote four of *Carolene Products*. That footnote, as interpreted by Ely, only permitted the Court to cure deficiencies in the democratic process. Ely never repudiated the Burger Court's refusal to consider the poor a "discrete and insular minority," deserving heightened scrutiny as a suspect class,¹⁵¹ even though "discrete" and "insular" are sufficiently ambiguous adjectives that they could have been used to justify a contrary interpretation under Ely's basic principle of representation reinforcement. Hungry, uneducated people cannot fully participate in the electoral process.

Professor Tribe found Ely's exclusive reliance on process - "representation reinforcement" - to be puzzling because it was arbitrary, inadequate and ultimately substantive, particularly as applied by Ely.¹⁵² Professor Tribe's treatise offered three abstractions that might trigger judicial help for the poor. First, he argued that one of the Constitution's unifying concerns is to protect "outsiders":

¹⁴⁸ Before he was a judge, Robert Bork made similar arguments, but in his characteristically blunter style. The title of his article indicates the nature of his opposition: *The Impossibility of Finding Welfare Rights in the Constitution*. See Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U.L.Q. 695 (1979). According to Bork, certain interpretations of the Constitution are not simply wrong or excessive, they are "impossible." Bork was thus implying that he had found a determinate test that can test constitutional solutions as if they were mathematical problems.

¹⁴⁹ J. ELY, *DEMOCRACY AND DISTRUST* (1980).

¹⁵⁰ L. TRIBE, *CONSTITUTIONAL LAW*, *supra* note 55.

¹⁵¹ In his classic work, Ely noted that the Burger Court has not been sympathetic to the poor, J. ELY, *DEMOCRACY AND DISTRUST* 148-50 (1980). In his only other extended reference to the poor, he observed they do not fit well under suspect classification analysis since "their problems are not often problems of classification to begin with." *Id.* at 162. Rather than consider that the poor's inability to get easily under the "discrete and insular minority" standard may call into question the justification for using that standard as a primary tool, Ely chose to delve no further into the issue of the poor.

¹⁵² Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980).

[T]he *core* concerns of equal protection, Article IV [Privileges and Immunities], and the commerce clause, are remarkably similar: all address the problems that occur when governmental action inflicts injury upon outsiders—whether *geographical* outsiders, as in the case of burden imposed on persons from other states; or *political* outsiders, as in the case of disadvantages visited upon minorities insulated from other groups within the state itself; or *psychological* outsiders, as in the case of actions adverse to persons whom those in power regard as different or inferior.¹⁵³

The poor, particularly poor children, are both political and psychological outsiders. Tribe also discovered a more directly relevant value underpinning all fourteenth amendment doctrine, “anti-subjugation.”¹⁵⁴ Poor children are presently the most subjugated group in our society; their share of the nation’s wealth has diminished steadily over the past twenty years. Such systematic subjugation and deprivation places them within Tribe’s third theme: the Court has a duty to protect “perennial losers in the political struggle.”¹⁵⁵ One could easily conclude that the poor, particularly poor children, are perennial losers, even if some members of that group escape.¹⁵⁶ One does not have to be a Marxist to believe that many poor children are trapped in a cycle of poverty. Yet, like Ely, Tribe refused to advocate that the Court order substantive commitments for the poor because the Court would face insurmountable remedial and causation problems: “the affirmative governmental duty to meet basic human needs cannot always be enforced directly—apart from . . . special situations Instead, it will usually be necessary to reflect affirmative duties less directly—through governmental obligations to provide procedural safeguards when the deprivation of welfare, wages, or household goods is involved”¹⁵⁷ This puzzling move repeats Ely’s substitution of process for substance.¹⁵⁸

¹⁵³ L. TRIBE, *CONSTITUTIONAL LAW*, *supra* note 55, at 545.

¹⁵⁴ *Id.* at 1514-21.

¹⁵⁵ *Id.* at 1454.

¹⁵⁶ The ability to eventually escape from the plight that generally affects one subgroup does not prevent a finding that that group deserves equal protection. Otherwise, blacks and women would no longer need equal protection because many of them have become very successful in our society.

¹⁵⁷ L. TRIBE, *CONSTITUTIONAL LAW*, *supra* note 55, at 1336, 1375.

¹⁵⁸ Professor Tribe also retreats to process when he proposes at the end of his treatise that the Court’s next major development should be to expand “structural justice”, to determine who should make what decisions within the constitutional framework. *Id.* at 1673-1687. Structural analysis, which looks at the flow of power within the entire Constitution, is process writ large. For example, it does not mandate any particular substantive results for the poor. On the other hand, one should not and cannot ignore the Constitution’s structure. One reason this article suggests more intensified judicial review of state action than of Congressional action is Madison’s argument that tyranny by faction is much less likely in large representative groups, such as Congress, than in smaller groups, such as state legislatures.

As Tribe observed in his treatise,¹⁵⁹ even Professor Michelman, who made the most powerful argument on behalf of providing significant substantive relief to poor people under the fourteenth amendment, qualified his argument that the Court must satisfy "just needs" in this affluent society. According to Michelman, definitional and remedial problems may limit judicial intervention to the elimination of total deprivations and/or protection of basic services that already exist.¹⁶⁰

Several liberal lawyers have leapt over the judicial competency and legitimacy problems, proposing significant wealth redistribution under the equal protection clause. Attorney William Taylor has argued that the existing isolation of the poor, particularly poor black children, violates the underlying goal of *Brown v. Board of Education*: providing equal opportunity for all children of all races to succeed.¹⁶¹ Professor Charles Black has derived a constitutional right to livelihood from the Declaration of Independence, the preamble of the Constitution, and certain parts of the rest of the Constitution.¹⁶² Professor Edelman has relied upon the fourteenth amendment to form the judicial duty to protect the poor:

an obligation which has been implicit in our constitutional structure all along, or at least since the American polity has had enough resources to share its wealth more equitably; and . . . an obligation which has been acquired as a consequence of the government's historic and continuing complicity in economic arrangements that foreseeably resulted in the current maldistribution. The first is a substantive due process argument; the second is an equal protection theory.¹⁶³

Critical Legal Studies (CLS) scholars¹⁶⁴ frequently distinguish between forms of liberalism, providing valuable insights. For instance, Professor Simon, who is affiliated with the CLS school, discussed how property rights and contract rights, metaphors for welfare benefits, prevailed over an entitlement theory of welfare rights because the common law metaphors were more consistent with dominant individualistic rhetoric.¹⁶⁵ The rights theories were used by politicians such as President Roosevelt and by the legal profession, while the entitlement imagery emerged out of

¹⁵⁹ L. TRIBE, *CONSTITUTIONAL LAW*, *supra* note 55, at 1337, n. 50.

¹⁶⁰ Michelman, *supra* note 143, at 997-1003, 1005-07, 1010-11, 1013-15.

¹⁶¹ Taylor, *supra* note 25, at 1703.

¹⁶² Black, *supra* note 25, at 1105.

¹⁶³ Edelman, *supra* note 25, at 5.

¹⁶⁴ The Critical Legal Studies Movement, which has attracted many left-wing academics, offers little guidance or solace at its most abstract level because it links modern liberalism with contemporary conservative perspectives:

People who think of themselves as deontological rights theorists and those who are openly utilitarian are linked; anarchic libertarians and New Deal apologists are treated as forming a school because, CLS proponents believe, they share certain fundamental attitudes and rhetorical styles that overwhelm their undeniably real differences.

M. KELLMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 3 (1987).

¹⁶⁵ Simon, *supra* note 135, at 1432.

the social work profession. Simon concluded that the decision to use common law metaphors cost the poor, even though its advocates had good motives and even though many of them chose that approach not because they believed it, but because they thought it would be more politically acceptable. The property and contracts metaphors politically isolated the welfare recipients from the Social Security recipients, who had at least paid some money into the system.¹⁶⁶

Simon's level of analysis only leads a litigator for the poor so far. The doctrinal counterattack to existing caselaw and to existing theoretical objections still needs to be formulated. If it is to have any chance of success with the existing court, that attack should directly respond to the arguments of judicial restraint, incorporating those countervailing concerns to some degree. Any such doctrinal compromise will probably fail to some degree, just as the property-rights metaphors also did not fulfill all of their advocates' hopes. It is easy to demonstrate how past compromises produced failures or incomplete successes. But those criticisms should not deter us from making similar compromises now, such as the one this article offers. At the very least, the process of proposing and analyzing new doctrinal compromises makes one more sensitive to the competing values that influence existing law.

Underlying all these concerns and issues is the jurisprudential disagreement over the meaning of the phrase "equal protection," both as a general proposition and as applied in the fourteenth amendment.¹⁶⁷ That debate, in turn, revolves around the concept of "equality," a concept that is at the core of most contemporary political theories. The Constitution mandates equality, but the content of that equality is open to a never-ending debate. Formal equality, the existing conservative ideal, requires that the rules be applied evenly; certain rules, such as race or sex laws, are presumptively unconstitutional because they give one group a perpetual and excessive advantage over another group for no legitimate reason. The primary criteria for distributing rewards and penalties should be merit—the primary mechanism, the market. Formal equality is highly suspicious of laws that appear to be stigmatic or which are premised upon inappropriate stereotypes, laws which injure people for traits over which they have no control (with the notable exception of intelligence).¹⁶⁸ Other visions of equality—economic equality, fulfillment of basic needs, compensation for past societal injuries and equality of opportunity—all require affirmative relief, albeit in differing amounts and to different groups. These other visions of equality are more difficult to reduce to

¹⁶⁶ *Id.* at 1466, 1504. Simon also criticized Charles Reich's *New Property* metaphor; characterizing welfare as a property right tended to encourage procedural protections for property, but did not increase substantive relief, because the idea of property implies the status quo. *Id.* at 1488. In other words, the welfare recipients have a right to whatever they are receiving, but nothing more.

¹⁶⁷ See, e.g., Michelman, *The Meanings of Legal Equality*, 3 HARV. BLACK LETTER L.J. 24 (1986); Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

¹⁶⁸ T. NAGEL, *MORTAL QUESTIONS* 104 (1979).

judicial standards because they are more empirically based. It is easy to prove that a statute facially punishes someone for being black, but it is far more difficult to determine when a child has been deprived of "equal opportunity."

The debate over equality determines the basic structure of society. It is an issue that bedevils political scientists and philosophers, not just judges and legal academics. The philosopher Thomas Nagel has written that three competing conceptions of moral equality explain the differences between economic egalitarianism, utilitarianism and individual rights: "[The conflict between these three beliefs] can also be viewed as a dispute about *how* people should be treated equally, not about whether they should be. The three views share an assumption of moral equality between persons, but differ in their interpretations of it."¹⁶⁹ Nagel explains that utilitarianism treats people equally via a form of majoritarianism: "The moral equality of utilitarianism consists in letting each person's interests contribute in the same way to determining what in sum would be best overall."¹⁷⁰ The individual rights theories give a person a limited veto over how he may be treated: "The moral equality of persons under this conception is their equal claim against each other not to be interfered with in specified ways."¹⁷¹ Economic egalitarianism blends the outcome perspective of utilitarianism with individual rights' analysis: "The moral equality of egalitarianism consists in taking into account the interests of each person, subject to the same system of priorities of urgency, in determining what would be best overall."¹⁷² The neverending, everchanging dispute over the meaning of equality is certainly too important and too complex a question to be left exclusively to the Supreme Court.

VI. DILUTING EQUAL PROTECTION TO HELP POOR CHILDREN

Before explaining how Congressional dilution of certain equal protection decisions could provide additional relief to poor children without undermining the existing Constitutional order, I want to make an underlying belief explicit. If I were a Supreme Court Justice, writing on a clean slate, I would find that every person has a "fundamental right" to have his or her "fundamental needs" met. This Article attempts to integrate that position into the existing caselaw without completely rejecting the premises that generated those opinions, particularly concerns about judicial competence and majoritarianism. This Article's conception of equal protection is a compromise, a lawyer's attempt to obtain what little may be available.¹⁷³

¹⁶⁹ *Id.* at 111. The fourteenth amendment's text does not determine which of the three conceptions of equality should prevail. It does not mandate "equal rights" or "equal utility." It requires "equal protection," which could include affirmative relief as well as individual rights.

¹⁷⁰ *Id.* at 113.

¹⁷¹ *Id.* at 114.

¹⁷² *Id.* at 118.

¹⁷³ It is unlikely that any of the five Justices who decided *Kadrmas* would make any significant efforts to provide additional constitutional protection to the poor. One cannot be sure, however. Furthermore, some of those Justices, as well as some of the more liberal Justices, may leave the Court within the foreseeable future.

For the reader who may have become weary or saddened by the previous description of the "devolution" of the constitutional rights of the poor, this Article shall repeat verbatim the "limited dilution" proposal presented in the Introduction: the Supreme Court should aggressively expand its definitions of equal protection and of due process, as applied to the states, by sometimes explicitly giving Congress the power to override some judicial decisions pursuant to section 5 of the fourteenth amendment.

A. *The Mechanics of Limited Dilution*

The Supreme Court would have three options in response to any plaintiff's allegations that a state law violated equal protection.¹⁷⁴ The court could decide: (1) the plaintiff had no valid claim; (2) the state's violation of equal protection was so egregious that Congress could not override the Court's decision; or (3) the state violated equal protection but Congress could reconsider that holding under section 5 of the fourteenth amendment. For instance, the Court should continue to uphold the constitutionality of a state deposit requirement for bottles, but not for cans, because such a law is an economic regulation and because the state can proceed a step at a time to protect its environment.¹⁷⁵ Relying on *Brown v. Board of Education*, the Court should and would use the second option to hold that any law mandating school segregation is an irreversible violation of equal protection. However, the Court could now find that a state law overtly injuring poor children—by requiring them to pay fees for school bus transportation, for example—violates equal protection. In fact, it could ignore the hostile precedent of *Kadrmas*¹⁷⁶ because that case was based upon the assumption that any favorable decision would be permanent judicial doctrine, changeable only by constitutional amendment. The Court would state in its opinion that Congress could reverse

¹⁷⁴ In fact, the Court does have a third option under existing law. It could hold that Congress could reconsider any "facts" because of its superior fact-finding competence, see Brennan's discussion in *Oregon v. Mitchell*, 400 U.S. 112, 249 n.31 (1970) (Brennan, J., concurring in part and dissenting in part). This potentially troublesome exception has not been utilized by Congress, which is one indication that Congress might be somewhat deferential if the Supreme Court made some "dilution" decisions.

The existing distinction is in some ways more disturbing than this Article's proposal. For example, could Congress find that integration actually harms black students, which would partially undermine *Brown v. Board of Education*, which was partially based upon sociological data? *Brown v. Board of Education*, 347 U.S. 483, 494 n.11 (1954).

¹⁷⁵ The Supreme Court upheld a state law prohibiting plastic milk cartons in *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 *reh'g denied*, 108 S.Ct. 2481 (1988). 450 U.S. 1027 (1981).

¹⁷⁶ 108 S.Ct. 2481 (1988).

the decision pursuant to section 5. One would hope, of course, that Congress would usually defer to the Court's initial finding of unconstitutionality. That deference, combined with legislative inertia, would permit many section 5 opinions to stand.

Nevertheless, Congress could pass a law, which must be presented to the President,¹⁷⁷ explicitly overruling a designated section 5 opinion. Congress would have no power to expand its bill beyond the facts of the original case. For instance, it could not pass a bill stating that the Supreme Court can never again consider any poverty issues to be equal protection issues. Otherwise, Congress would be making an initial determination of the constitutionality of an individual rights issue, thereby violating *Marbury v. Madison*.¹⁷⁸ Furthermore, some poverty-based rights, such as the indigent's right to a free counsel in a capital case,¹⁷⁹ remain nondilutable since failure to provide a lawyer in such a case is so unreasonable that neither Congress nor the states can so proceed. Such a maneuver would also defeat one of the purposes of the proposal: to allow the Court and Congress to engage in a meaningful dialogue about difficult constitutional problems. If either side can quickly prevail over the other, the discussion would terminate. For example, if Congress held that states could charge bus fees to indigents, thereby reinstating *Kadrmas*, the Court could still void a subsequent state law that made poor children pay for their text-books. The Court would clearly be asking Congress to reconsider its prior decision to revive *Kadrmas*. Eventually, of course, Congress could seal off an entire area of potential equal protection rights. But at least the issue would have been clearly presented to the people. All of us would be more directly responsible for the treatment of school-children throughout the country. One of the functions of law, including constitutional law, is to force the populace to be aware of and responsible for the impacts of their choices.

B. The Substance of Dilution

The Court will have a difficult problem determining which of the three responses applies in a given case. Making such distinctions, however, would not be a novel enterprise. The Court already struggles when de-

¹⁷⁷ *Immigration & Naturalization Serv. v. Chada*, 462 U.S. 919 (1983). The Supreme Court held Congress could use its legislative powers to override a decision by the Attorney General that an alien should not be deported unless Congress passed a bill through both houses and presented it to the President so he or she could decide whether or not to veto the act.

¹⁷⁸ 5 U.S. (1 Cranch) 137 (1803).

¹⁷⁹ See *Powell v. Alabama*, 287 U.S. 45 (1932); *Betts v. Brady*, 316 U.S. 455 (1942); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

termining who should prevail under the Equal Protection Clause. Justice Marshall has argued for many years that the Court actually utilizes a sliding scale to ascertain the fourteenth amendment's coverage: "[The Court] has focused upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits they do not receive, and the state interests asserted in support of the classification."¹⁸⁰ In *City of Cleburne v. Cleburne Living Center*,¹⁸¹ Marshall noted that the plurality decision, which required a city to grant a building permit to a group of mentally retarded citizens, could not be explained by the plurality's use of the highly deferential rational purpose test. According to Marshall, the plurality used the tools of heightened scrutiny when it closely scrutinized the record and put the burden of proof on the state by refusing to accept certain objectives or fears as "rational".¹⁸²

Under the proposed test, the Court would not just follow Justice Marshall's test, which consists of assessing the impact of the state action on the plaintiff, the nature of the plaintiff class, and the asserted state interests.¹⁸³ The Court would also consider the "justiciability" problems that encourage judicial restraint: deference to the elected branches, changing data, difficulty in forming remedies, problems in determining the impact of the policy or of proposed alternatives, and political impact. These factors, which may have prevented judicial intervention in the past, remain relevant, but are now surmountable. Congress, one of the two nationally elected branches, could correct any judicial errors or any significant deviations from the majority's will.¹⁸⁴ The Court would no longer be caught in the stagnant pool of existing equal protection doctrine. The Court could take more chances, knowing it was no longer creating permanent constitutional definitions of equality by itself.

If the Court adopted this article's redefinition of section five, all pre-existing doctrine denying plaintiffs their equal protection claims would

¹⁸⁰ *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 318 (1976) (Marshall, J., dissenting). Justice Stevens has recently adopted a similar balancing test to determine a statute's reasonableness:

In every equal protection case, we have to ask certain basic questions. What class is harmed by the legislation, and has it been subjected to a 'tradition of disfavor' by our laws? What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment? In most cases the answer to these questions will tell us whether the statute has a 'rational basis.'

City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 453-55 (1985) (Stevens, J., concurring).

¹⁸¹ 473 U.S. 432 (1985).

¹⁸² *Id.* at 459.

¹⁸³ *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. at 318 (Marshall, J., dissenting).

¹⁸⁴ Of course any Congressional action would either have to be approved by the President or override the President's veto, see *I.N.S. v. Chada*, 462 U.S. 919 (1983).

be partially destabilized. Until *Richmond* and *Metro*, equal protection cases were decided upon the assumption that any decision favoring plaintiffs permanently and equally bound the States and the federal government.¹⁸⁵ Consequently, all decisions that refused to create equal protection rights against the States could be reconsidered since this new doctrinal remedy is available, a remedy that undercuts many of the reservations that initially generated those adverse decisions. The Court can reconsider both the general contours of equal protection, which groups or traits deserve intensified scrutiny and the specific holdings of the cases, and how equal protection should be applied to the facts of a given case. Yet those cases which found that governments violated equal protection would remain unthreatened. Those decisions were based upon the assumption that the Court must have the final word in that particular situation; the Court has already rejected the competing concerns about remedial problems or deference to the majority. Thus, when the Court tries to determine if a right is dilutable or not, it retains a large body of undisturbed doctrine, as a baseline, to help it decide which rights should be completely immune from legislative reconsideration.

The Court could also correct some of its existing doctrinal confusion. For example, a plurality held in *Cleburne* that a community did not even have a "rational purpose" for denying a group home permit to some mentally retarded citizens. Apparently fears about how the mentally retarded might behave - and/or of lowered property values - were "irrational." Irrespective of the test chosen, the Court did not intend for its decision to be reconsidered by Congress. The Court assumed it was making permanent constitutional law. Consequently, it might reorganize cases involving the mentally retarded as a mixture of "strict scrutiny" decisions, untouchable by Congress, "intermediate scrutiny" decisions, some of which would be reversible by Congress, and "rational purpose" decisions, which would always validate the existing law. *Cleburne* would represent a baseline in the first category. As the plurality noted in *Cleburne*, some specific regulation of the mentally retarded may be necessary, if only for their protection.¹⁸⁶ For example, the Court would have more difficulty in determining the constitutionality of a law that prohibited drivers' licenses to people who had a low I.Q. In such a case, it might either defer or make an initial finding of irrationality, reversible by Congress. Distinguishing between benign paternalism and oppression can be difficult; the Court could and should pass final resolution of some of these problems to Congress.

¹⁸⁵ Equal protection requirements apply to the federal government through the equal protection component of the due process clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

¹⁸⁶ *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 442-443 (1984).

C. Applying the New Doctrine to Impoverished Children

1. Doctrinal Reorganization

The first part of this article was dedicated to showing how poor children could make a strong case that they should at least receive dilutable equal protection. They are politically weak. They are suffering through no fault of their own. Their needs are extreme, insufficiently met, yet partially resolvable by governmental action. This country has frequently exploited the poor, and is now relegating many of their children to squalid, dangerous ghettos. In short, poor children are currently society's biggest set of innocent losers. In a few years, it may be another group.

Assuming that the Court agreed, for any number of reasons, to use this new tool to aid impoverished children, how might this doctrinal shift actually operate? This Article shall outline one possible solution to the fit between youth poverty and equal protection. Recall that virtually all prior cases finding equal protection rights on behalf of the poor remain nondilutable.¹⁸⁷ Because application of the doctrine brings the Court ever more overtly into the social policy arena, the article shall then consider some of the conservative sociological arguments that might be used against the proposed extensions.

The Court could find that some rights of the poor are undilutable, even though it had previously ruled against plaintiffs in similar cases. For instance, it might completely reject statutes that facially discriminate against poor children (or the poor), thereby overruling *James v. Valtierra*,¹⁸⁸ which upheld a state law which facially discriminated against the poor by establishing procedural hurdles to the creation of low-income housing. States could not pass laws that make it uniquely difficult for poor people, as a group, to participate in the political process. At least as a disabling trait, poverty would once again become constitutionally irrelevant, as contemplated in *Edwards v. California*.¹⁸⁹ One justification for the *James* decision was the fear of completely constitutionalizing the poverty issue. That concern is less acute if most of the difficult poverty issues ultimately can be resolved by Congress. But a permanent, bright line should be drawn against using poverty as an explicit disabling trait.

The Court might decide not to extend nondilutable equal protection beyond that bright line. On the other hand, a sympathetic and creative Court could find that all "total deprivations" of "fundamental needs" of any subgroup of poor children are also unreviewable violations of equal protection. Such a principle could be derived from *Plyler*, which held that states cannot preclude one group of children, the children of illegal aliens, from attending public schools that are open to all other children.¹⁹⁰ Such

¹⁸⁷ *Plyler* may already be dilutable under Congress' "plenary" power to regulate immigration. Thus its status has not been completely resolved by this article.

¹⁸⁸ 402 U.S. 137 (1971).

¹⁸⁹ 314 U.S. 160 (1941).

¹⁹⁰ *Plyler v. Doe*, 457 U.S. 202 (1982).

violations are egregious, easy to prove, and easy to cure. The Court simply orders the state to extend the desperately needed service to the group of children who do not receive it. The Court would require the states to provide poor children the same basic resources they make available to all other children. States should not be able to isolate sub-groups of poor children, who already are becoming more and more cut off from the rest of society. Under such a broad interpretation of *Plyler*, the Court could reverse *Kadrmas*, which permitted the state to charge some poor children for school bus fees while not charging other children (rich and poor) for the same service.¹⁹¹

The Court might permit Congress to review any judicial decision requiring the states to provide "basic needs" above "total deprivation". The proof and remedial problems become far more severe. Plaintiffs can easily show total deprivation, but will find no self-evident standard that determines the level of aid that satisfies basic needs or wants. For example, in *Rodriguez* the plaintiffs received a minimally adequate free education. The Court could hold that states must provide equal resources to all public schools, thereby overruling *Rodriguez*, but also hold that decision could be reversed by Congress.¹⁹² If the Court did not want to expand *Plyler* at all, it could initially prevent states from charging fees to poor children for such public services as school bus transportation, schoolbooks,¹⁹³ school expenses, school lunches, and zoos. In fact, the *Kadrmas* case, which upheld charging school bus fees to indigent children, provides a perfect example of when and how this dilutable doctrine might apply. The Court might have been more willing to strike down that brutal state law if it knew Congress could intervene.

Statutes that have a strong adverse impact on poor children could also be more carefully scrutinized. Statutes that harshly limit benefits while simultaneously undermining families, such as the law in *Dandridge* which required a new baby in a large poor family to try to live off of its siblings' paltry welfare benefits, could also be struck down as a dilutable deprivations of equal protection. On the other hand, the Court should be wary of extending any heightened scrutiny to the state's support and toleration of the general effects of the market.

Remedial problems will present severe, but not insurmountable problems. The Court could either use the doctrine sparingly, to eliminate such cruelties as charging fees for school buses, or it could try to significantly reallocate resources by rigorously enforcing the right to "basic needs." For instance, the Court could frame an injunction establishing a right to

¹⁹¹ *Kadrmas v. Dickinson Public Schools*, 108 S. Ct. 2481 (1988).

¹⁹² Not that equal spending in education will create miracles: "During 1982-83 school year, Chicago spent \$3,574 per pupil. That was about \$9 more than the average per pupil spending in suburban school districts and about \$300 more than the averages in DuPage and Lake Counties." CHICAGO TRIBUNE, MILLSTONE, *supra* note 36, at 143.

¹⁹³ *Carnes v. Kentucky*, 429 U.S. 1049, (1977) (certiorari denied).

"basic needs" by taking the federal government's poverty line as a baseline. It could either use that amount or some percentage of it as a mandatory minimum, creating a means based guaranteed annual income as its standard for evaluating poverty claims. The Court would also have to create a sliding scale so that those who work for low wages would not lose their incentive to work. The Court might also order the states to adjust welfare amounts to take inflation or deflation into account, even engaging in state by state or area by area analysis of costs of living. Such an inquiry would be difficult, but would be no more challenging than determining when a state legislature has improperly used gerrymandering to determine electoral districts—a responsibility the Court has recently placed upon the federal court system.¹⁹⁴

2. Policy Considerations

How is the Court to use its new discretion under section 5 when there is no agreement over the causes of poverty, and thus over the cures? Determining, much less isolating, the causes of individual, group or societal decline is an extremely difficult enterprise. Problems of causation in social science and history dwarf the issues of causation that usually trouble lawyers. Some will blame the individual for his or her poverty, others the economy for not providing enough decent jobs, others the culture, and others the poor person's "cultural inheritance."¹⁹⁵

A major justification for the dilution concept is social need. The country is suffering from severe social problems—particularly the increasing isolation and devastation of the poor—which do not easily lend themselves to permanent constitutional resolution, but which could benefit from a judicial perspective. But overtly opening the door to social theory allows the admission of some unwanted views, at least from the contemporary liberal perspective. The Court might prefer to adopt the views of conservative sociologist Charles Murray, concluding that even if section 5 should be reinterpreted to give groups such as poor children enhanced protection, it should not increase welfare benefits. Murray had concluded that such benefits injure the poor by destroying their incentive to work.¹⁹⁶ The Court might accept Jane Jacobs' diagnosis that handsome welfare benefits undermine the entire culture, not just the lives of the poor: "If [welfare programs] are unremitting, they too drain city earnings unremittingly. If they are at all generous, then if anything they are even more voracious feeders on cities than military programs."¹⁹⁷

¹⁹⁴ *Davis v. Bandemer*, 487 U.S. 109 (1986).

¹⁹⁵ T. SOWELL, *CIVIL RIGHTS: RHETORIC OR REALITY?* 29 (1984).

¹⁹⁶ David Hume expressed similar views over two hundred years ago: "Giving alms to common beggars is naturally praised; because it seems to carry relief to the distressed and indigent: but when we observe the encouragement thence arising to idleness and debauchery, we regard that species of charity rather as a weakness than a virtue", D. HUME, *AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALS* 13 (1777).

¹⁹⁷ J. JACOBS, *CITIES AND THE WEALTH OF NATIONS* 191 (1985).

Charles Murray may be correct in arguing that providing any welfare benefits, much less generous welfare benefits, is counterproductive at the aggregate level. Even one of his critics, William Wilson, conceded that welfare cripples some families by allowing young girls with babies to leave their homes at a very early age.¹⁹⁸ On the other hand, Wilson pointed out that Murray does not explain why poverty has increased even though the real value of welfare, adjusted for inflation, has dropped significantly over the past fifteen years.¹⁹⁹ Wilson also noted that Murray ignores the impact of much higher unemployment on the poor.²⁰⁰ Wilson argued that welfare did not increase poverty, but rather that poverty would have increased much more without welfare.²⁰¹ Senator Moynihan cited a study showing that the number of children actually on AFDC has remained relatively constant during the last decade,²⁰² and that different levels of welfare benefits in different states did not affect family structure.²⁰³ Nevertheless, Murray's interpretation of the data cannot be completely refuted; the only way to test his hypothesis/proposal would have been to eliminate welfare during the past twenty years.²⁰⁴ If welfare were eliminated now, causing disaster, Murray might claim that the catastrophe would not have struck if welfare had been eliminated earlier. Ideology can usually explain away facts.

Certainly a Supreme Court Justice, or even a Congressman or legal academic, will be hardpressed to be sure that he or she understands the

¹⁹⁸ W. WILSON, *supra* note 27, at 186.

¹⁹⁹ *Id.* at 17.

²⁰⁰ *Id.*

²⁰¹ See e.g. J. SCHWARZ, *AMERICAN'S HIDDEN SUCCESS* (1988).

²⁰² D. MOYNIHAN, note 32, at 130.

²⁰³ *Id.* at 136.

²⁰⁴ The vigorous debate among social scientists over the causes and cures for poverty can intimidate lawyers into deference. Consider the following formula from a recent series of papers reviewing experimental programs that authorized guaranteed annual incomes: "[A] simple way to represent the treatment is: $H = a + b_1T + b_2(DG) + b_3(Dt) + gZ + dX + e$, Burtless, *A Work Response to a Guaranteed Income: A Survey of Experimental Evidence*, in *LESSONS FROM THE INCOME MAINTENANCE EXPERIMENTS* 32 (A. Munnell, ed., 1987). The experiments were criticized for not always having control groups to avoid self-selection, Munnell, *An Overview*, *id.* at 20. One scholar criticized the samples for being too small, but did conclude that "the experiments did not stabilize families and . . . may have been destabilizing." Ellwood, *Discussion*, *id.* at 98. The program was attacked for being dominated by economists, Nathan, *Lessons for Future Public Policy and Research*, *id.* at 254.

There was dispute over the program's impact. One analyst found that the program did not destabilize two parent families which already had children, Cain, *The Income Maintenance Experiments and the Issues of Marital Stability and Family Composition*, *id.* at 90., in apparent disagreement with the finding that the program did split up two parent families, Hall, *Discussion*, *id.* at 58-59. The experiments also had unforeseen benefits: the recipients' becoming better educated, an improved birth rate and improved nutrition, Bradbury, *Discussion*, *id.* at 125. Yet the long-run impact of such a program could not, by definition, be clear since the experiment lasted for a short period of time, Burtless, *id.* at 46.

current state of the underclass, which has gone through yet another wave of deterioration caused by the proliferation of youth gangs selling "crack," a highly addictive form of cocaine. Even a significant re-allocation of resources will not eliminate the misery and the destructive social patterns that currently exist. As Jane Jacobs pointed out, Marshall Plan funds benefited certain parts of Europe far more than other parts, depending upon the underlying strengths and weaknesses of the area aided.²⁰⁵ Thomas Sowell has argued that cultural inheritance is more important than legal structures: "the reality of group patterns that transcend any given society cannot be denied."²⁰⁶

A simple way remains out of this utilitarian quandary. One can simply believe that individual children should not live without basic necessities in this affluent society, whatever the potential costs and benefits. No matter what this society does, it may drift into decline, with the brunt of the deterioration falling on the poor. But whatever our future may be, we must reaffirm our commitment to and love for our young by not subjecting them to brutal social experiments, such as those proposed by Murray. Such a moral commitment may prevent the decline; but even if it does not, we shall have affirmed a moral vision of human community. Professor John Finnis has argued that certain goods are self-evident to a reasonable person,²⁰⁷ just as certain bads need explanation.²⁰⁸ One hardly need explain why taking reasonable care of one's young is an essential part of decent human nature and of a decent society. Refusing to feed and to clothe children needs a better explanation than that it *may* improve the lot of some of those who survive the suffering, even the brain damage, that would definitely result from such a policy. At some point, certain means are immoral, whatever the aggregate benefits.

Consequently, Murray's analysis may fail on at least four levels: as an accurate reading of the data, as the basis for his extreme solution of eliminating welfare, as a utilitarian solution to the elimination of the suffering of poverty, and as a deontological proposition of how to treat children. But the existing Court, of course, will almost certainly refuse to change its current doctrine, particularly if it believes all of its decisions will become a permanent, unamendable part of the Constitution. To most of the Justices, the debate over poverty is a political one that should be resolved legislatively. Thinkers like Murray and Sowell provide additional justifications for not helping the poor, or at least doubts about how to help the poor. Even if most of the Justices don't believe they are actually helping the poor by not helping them, they can believe that the issue is sufficiently complex and political that the judiciary should not become involved.

²⁰⁵ J. JACOBS, *supra* note 197, at 8.

²⁰⁶ T. SOWELL, *CIVIL RIGHTS: RHETORIC OR REALITY?* 29 (1984).

²⁰⁷ J. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 63-73 (1980).

²⁰⁸ *Id.* at 209.

Such deference to changing sociological theory and to underlying political currents is less justifiable if the Court adopts this Article's proposal. It need not worry about permanently constitutionalizing its responses to the poverty problem. It can aggressively protect the poor, by requiring free textbooks and free school-bus rides, for instance, without fearing that it will completely and permanently alter the existing structure. It can lead, but not dominate.

VII. THE CONSTITUTIONALITY OF A DOUBLE STANDARD AND OF LIMITED DILUTION

As noted in the Introduction, Justice O'Connor made no detailed effort in *Richmond* or in *Metro* to justify her double standard of being more deferential to Congressional affirmative action plans than to similar state plans. This section will defend the double standard and demonstrate that it supports the Article's proposal for "limited dilution."

A. *The Double Standard and Limited Dilution do not Conflict with Marbury v. Madison*

Richmond's creation of a double standard arguably undermines the most important case in constitutional law, *Marbury v. Madison*²⁰⁹ by potentially giving Congress the power to reverse the Court on constitutional issues and the power to define certain individual constitutional rights. A more contemporary, directly relevant restatement of the *Marbury* theory of judicial supremacy in constitutional interpretation appeared in *Shapiro v. Thompson*: "Congress may not authorize the states to violate the Equal Protection Clause."²¹⁰ *Marbury*, however, does not require the Court to always retain a trump over Congress on every constitutional issue.²¹¹ *Marbury* only requires that the Court initially interpret the constitution in all cases raising constitutional issues. For example, Congress can authorize state actions that the court had previously found unconstitutional in such areas as the dormant commerce clause. The Supreme Court may decide, under the political question doctrine or in its interpretation of "standing," that the Constitution authorizes or permits the other branches to resolve particular issues. In other words, *Marbury* does not always preclude another branch from having the last word on specific constitutional issues. The Court must have the first word—the jurisdictional power to decide who finally decides which constitutional issues. The Court

²⁰⁹ 5 U.S. 137 (1803).

²¹⁰ 394 U.S. 618, 641 (1969).

²¹¹ Professor Wechsler argued that *Marbury* only gave the federal courts jurisdiction to determine if they have jurisdiction to resolve a case on its merits: "[The federal courts] must decide a litigated issue that is otherwise within their jurisdiction and in so doing must give effect to the supreme law of the land." Wechsler, *The Courts and the Constitution*, 1965 COL. L. REV. 1001, 1006 (1965).

retains that power under the proposal because it initially determines which of its fourteenth amendment decisions can be reviewed by Congress and which fourteenth amendment rights are never dilutable. It would create the double standard, and subsequently determine the scope and impact of that standard.

The *Shapiro* quotation, focusing on the fourteenth amendment, is more directly on point. The *Shapiro* Court had held that Congress had no more power than the States to require a one year waiting period for welfare benefits.²¹² Nevertheless, *Shapiro* does not determine the full meaning of the equal protection clause. *Shapiro* only stated that neither Congress nor the States can make that particular residency law, a holding which would remain unaffected by the new doctrine. Under the dilution doctrine, Congress would not violate equal protection nor would it authorize the states to violate equal protection if the Court had previously determined that Congress can authorize the states to engage in the activity that the Court had initially found to be a violation of equal protection. The *Shapiro* statement is sufficiently circular that it supports both sides of this debate. If one concludes that Congress can never narrow a judicial equal protection case or can never be held to a different standard than the states, then Congress will always violate equal protection if it violates these principles. If one decides that the Court may create a double standard for some equal protection issues, giving more power to Congress than to the States to define Equal Protection, then Congress will not have violated equal protection whenever it uses that power to reverse the Court. And those predicates, of course, are the bone of contention. They cannot be answered by the conclusion. The whole point of this Article is to discuss what equal protection should mean, not to suggest that Congress has any power under section 5 to violate equal protection once the proper definitions of equal protection and section 5 are agreed upon.

Even if *Marbury* and *Shapiro* only stand for the proposition that Congress cannot violate the Constitution as interpreted by the Court, they remain directly relevant if the proposed expansion of section 5 is hopelessly inconsistent with existing section 5 doctrine. In other words, if the Court has already interpreted section 5 to preclude this Article's suggestion, then either the proposal is invalid or else that prior doctrine has to be altered. We shall see that this doctrine does co-exist with existing doctrine, albeit somewhat uncomfortably.

*B. Are "Limited Dilution" and Richmond's Double Standard
Consistent with Existing Section 5 Law?*

Congressional efforts to enhance voting rights have been a focal point of section 5 litigation. In 1966, the Court twice upheld Congressional

²¹² 394 U.S. at 642.

statutes designed to protect minority voters. Chief Justice Warren concluded in *South Carolina v. Katzenbach*²¹³ that Congress has greater discretion than the Court in devising remedies to violations of the fourteenth and fifteenth amendments. Specifically, Congress has the power under section 5 to outlaw literacy tests, even though the Supreme Court had previously held that literacy tests were constitutional in *Lassiter v. Northampton Election Board*.²¹⁴ The Court's distinction between rights and remedies should not obscure the fact that Congress effectively overruled a prior Supreme Court interpretation of the fourteenth amendment. Admittedly *South Carolina* is distinguishable from this Article's proposal because Congress expanded the scope of equal protection, but the case did establish the threshold principle that Congress has some independent power to interpret the fourteenth amendment. Instead of waiting for Congress to redefine the fourteenth amendment more aggressively, the Court would be initially suggesting to Congress how it should use its broad powers under section 5.²¹⁵

In *Katzenbach v. Morgan*,²¹⁶ the Court allowed Congress to alter existing language requirements for voting so that Puerto Ricans who did not speak or read English could vote. The Supreme Court upheld similar Congressional expansions of equal protection beyond existing caselaw in *Oregon v. Mitchell*²¹⁷ and *Rome v. United States*.²¹⁸ But the *Oregon* court also found limits to Congressional power under section 5. Congress could not require states to give eighteen year-olds the right to vote in state and local elections. That limitation on Congressional power over the states does not preclude Congressional power to revive a subset of state powers previously struck down by the Court. In *Oregon*, the states are being protected from Congress— under the proposal, Congress is helping the states.

Several members of the Court have permitted the use of Congressional power outside the voting context. The majority partially relied upon section 5 to justify a Congressional affirmative action scheme in *Fullilove v. Klutznik*.²¹⁹ The affirmative action dilemma demonstrates the need for a flexible interpretation of section 5. One hopes that the need for affirmative action will diminish over the years. But who should determine when affirmative action programs should exist; how long they should last; and

²¹³ 383 U.S. 301 (1966).

²¹⁴ 360 U.S. 45 (1959).

²¹⁵ This technique has the same virtues as the dormant commerce clause doctrine. Most individuals have great difficulty getting a Congressional law passed. A lawsuit is quicker, more responsive to individual facts, and promptly able to eliminate new violations. Thus the technique would empower impoverished individuals to battle states without having to first go to Congress.

²¹⁶ 384 U.S. 641 (1966).

²¹⁷ 400 U.S. 112 (1970).

²¹⁸ 446 U.S. 156 (1980).

²¹⁹ 448 U.S. 448 (1980). Chief Justice Burger cited both *Katzenbach v. Morgan* and *Oregon v. Mitchell* to support the following: "A review of our cases persuades us that the objectives of the MBE program are within the power of Congress

who they should cover? New oppressed or suffering groups may emerge, such as Mexican-Americans or Haitians.

As discussed in the Introduction, the principal *Richmond* decision and all the *Metro* opinions overtly create a double standard for the states and for Congress, the precondition for any dilution. This Article's extension of the double standard in the affirmative action area should not be construed as approval of the actual *Richmond* decision. I believe O'Connor misapplied the double standard.²²⁰ Because Congress has created affirmative action programs for federal contracts and because Congress has not exercised its section 5 powers to ban similar state plans, the Court should not have intervened, particularly to the disadvantage of Southern blacks, the primary historical beneficiaries of the fourteenth amendment. O'Connor's position in *Metro* is even more disturbing; she put virtually the same constraints on Congress as she did on the States.²²¹

All the section 5 decisions involved Congressional remedies which provided more relief than did existing judicial definitions of equal protection. Thus the Court never has directly decided a case where Congress narrowed pre-existing judicial equal protection law. However, Justice Bren-

under § 5 'to enforce by appropriate legislation' the equal protection guarantee of the fourteenth amendment." *Id.* at 476.

In his concurrence, Justice Powell discussed section 5's limits: "But the United States may not employ unconstitutional classifications, or base a decision upon unconstitutional considerations, when it provides a benefit to which a recipient is not legally entitled." *Id.* at 515 n. 13 (Powell, J., concurring). Powell's invocation of the unconstitutional condition theory does not defeat this article's suggestion. Congress may be able to impose conditions that states cannot. If so, then there is no violation of equal protection or of the equal protection component of the due process clause of the fifth amendment.

Justice Stewart, joined by Justice Rehnquist, argued in his dissent that Congress had exceeded its powers: "For in the exercise of its powers, Congress must obey the Constitution just as the legislatures of all the States must obey the Constitution in the exercise of their powers. If a law is unconstitutional, it not less unconstitutional just because it is a product of Congress of the United States." *Id.* at 526-27 (Stewart, J., dissenting). He elaborated on this point in a footnote: "[The enforcement clauses of the thirteenth and fourteenth Amendments do not grant] to Congress the [power] to enact legislation that itself violated the equal protection component of the Fifth Amendment." *Id.* at 528 n.7.

When one considers the procedural sloppiness that generated this particular program, a sloppiness that Justice Stevens found to be fatal, *Fullilove* suggests that the Court already applies a double standard of equal protection. Would the Court be as deferential to a state affirmative action plan if the state had acted as summarily as Congress had, particularly if the beneficiaries were not black?

²²⁰ Under this Article's approach, Congress may have the power to prohibit all affirmative action progress. Indeed, four Justices so construed Title VI in *Bakke*, 438 U.S. 265 (1977). On the other hand, the Court should engage in at least intermediate scrutiny of any act that disadvantages blacks under the fourteenth amendment. As I noted in my Introduction, this article is not primarily about affirmative action. The precise application of this doctrine would need to be carefully issued out in light of the confusing caselaw. For example, how should the court review a congressional statute extending affirmative action to women but not to blacks? I prefer to emphasize the youth poverty issue, not the affirmative action problem.

²²¹ *Metro Broadcasting, Inc. v. F.C.C.*, 110 S.Ct. 2997, 3030 (O'Connor, J. dissenting).

nan wrote a footnote in *Katzenbach* explicitly proscribing any such Congressional efforts to reduce judicial powers:

Contrary to the suggestion of the dissent, [citation omitted] § 5 does not grant Congress power to exercise discretion in the other direction and to enact 'statutes so as in effect to dilute equal protection and due process decisions of this Court.' We emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees. Thus, for example, an enactment authorizing the States to establish racially segregated systems of education would not be — as required by § 5 — a measure 'to enforce' the Equal Protection since that clause of its own force prohibits such state laws.²²²

Justice O'Connor reaffirmed *Katzenbach* in *Mississippi University for Women v. Hogan*.²²³ After first holding that Congress' Title IX did not permit any sexual discrimination at the college level, O'Connor observed: "Although we give deference to congressional decisions and classifications, neither Congress nor a State can validate a law that denies the rights guaranteed by the fourteenth amendment."²²⁴

Justice Powell, on the other hand, endorsed the theory that section 5 creates two standards, generating more power for Congress than for the States. In *Fullilove*, Powell implied in his concurrence that Congress may have exceptional powers in implementing affirmative action programs: "The degree of specificity required in the findings of discrimination and the breadth of discretion in the choice of remedies may vary with the nature and authority of a governmental body."²²⁵ Powell's position, of course, became law in *Richmond* and *Metro*.

Justice Brennan's analysis of section 5 in *Katzenbach* and Justice O'Connor's reaffirmation of the nondilution doctrine in *Hogan* do not present insurmountable hurdles to the acceptance of this Article's prop-

²²² 384 U.S. at 651 n.10. Justices Brennan, White and Marshall elaborated on this argument in their dissent from that part of the decision in *Oregon v. Mitchell* which held that Congress could not require the States to give eighteen year-olds the right to vote in state elections. According to the dissenting justices, equal protection identically binds Congress and the States:

a decision of this Court striking down a state statute expresses, among other things, our conclusion that the legislative findings upon which the statute is based are so far wrong as to be *unreasonable*. Unless Congress were to unearth new evidence in its investigation, its identical findings on the identical issue would be no more reasonable than those of the state legislature.

Oregon v. Mitchell, 400 U.S. 112, 249 n. 31 (Brennan, J., concurring and dissenting) (emphasis added). This dissenting position is incompatible with the article's proposal, which does not require Congress to make new factual findings.

²²³ 458 U.S. 718 (1982).

²²⁴ *Id.* at 732.

²²⁵ 448 U.S. at 515 n. 14 (Powell, J., concurring).

osition. In large part, those opinions restate the *Marbury/Shapiro* thesis that Congress cannot violate equal protection. Thus the immediate question remains begged. If the Court held that Congress could dilute certain equal protection holdings because of section 5, without violating equal protection, then Congress would not violate equal protection in such situations.

There are three additional reasons to discount all prior judicial discussions about section 5. First, all of the analysis is dicta because the Court has never held that Congress has improperly diluted an existing equal protection guarantee. The Court has upheld expanded Congressional power, construed Congressional actions to avoid constitutional conflict, or held, in *Oregon*, that Congress exceeded its supplemental powers. Second, the Justices discussed dilution without considering the possibility that there might be the proposed fourth level of scrutiny, an "intensified scrutiny" that could be reversed by Congress. We cannot be sure that any of the Justices would reject this new conception of dilution until they considered it. Perhaps a majority of them would welcome a dialogue with Congress about some of the more difficult determinations of "reasonableness." Finally, it bears repeating that this new doctrine would not dilute any existing fourteenth amendment rights nor any additional fourteenth amendment rights that the Court seeks to keep immune from Congressional review. This doctrine would only expand judicial and Congressional review over a set of issues which would presently be resolved in favor of the States.

Justice Brennan's concurrence/dissent in *Mitchell* presents a more serious obstacle, because Brennan discussed how the underlying substance of equal protection analysis affects the scope of section 5. On one level, his argument endorsed a limited amount of dilution; he concluded that a prior Supreme Court decision which found a state law unconstitutional could be reversed by Congress if Congress came up with a new set of facts that made the governmental action "reasonable." This Article's proposal, however, envisions both a greater and a lesser scope for Congressional action. Congress would be able to dilute certain equal protection decisions even if it had not found any new data to support the previously repudiated state law. "New facts" would not be the necessary for limited dilution.

The underlying problem is easy to state and difficult to resolve. How is the Court to define "reasonableness?"²²⁶ That inquiry leads the Court into the bewildering world of impermissible purposes, the fit between ends and means, alternatives, stigmas, prejudices and stereotypes. As the Court moves from questions of formal equality to more egalitarian issues, the state's interests tend to become more "reasonable." The state can always respond to any redistribution of wealth claim by stating that it chose not to aid the poor in a given way because (1) it had insufficient

²²⁶ A. MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* (1988).

resources;²²⁷ (2) the poor would be worse off in the long run; and/or (3) the benefits are not essential. The proposed doctrine would acknowledge the difficulty of the inquiry by allowing both the Court and Congress more room to participate in these more difficult decisions.

The problems with existing dilution doctrine can also be demonstrated by returning to this Article's initial premise. One can imagine a Court that would find "unreasonable" societal indifference to or exploitation of continuous suffering by an innocent group. But that political assessment would be difficult to make and difficult to enforce over time. If the Court is to be a caretaker for losing groups, whose membership may change (the elderly were far poorer fifteen years ago), it should not perform that role alone. Characterizing many disturbing, unequal distributions of wealth and power as totally "unreasonable" not only begs the question of "reasonableness," but also oversimplifies that difficult issue.

The ambiguity of "reasonableness" also appears in existing substantive equal protection doctrine, thereby providing another justification for the proposed doctrine. Justice Stevens' conclusion in *Kadrmas* that the state had no "rational" reason to charge indigents to use the schoolbus obscures as much as it reveals. Justice Marshall's sliding scale, which balances the individual's interests against the state's interests, is not much more helpful than Stevens' "rationality" test. Both signify that the final judicial result will neither be easily determined nor clearly definable. Whenever the Court tries to protect certain groups, such as the mentally retarded, the mentally ill or the aged, the state can assert interests and reasons which are not as vicious or as historically tainted as race or sex based laws. For instance, it is not self-evidently "unreasonable" for the State to conclude that at some age most people become less dynamic workers, and that keeping all workers employed until they die or quit blocks opportunities for younger workers. At some point the state may try to draw a bright line barring people above a certain age from participating in certain occupations. How is Marshall to balance those asserted interests? He may blunder in applying his test in age discrimination cases—requiring states to employ bus drivers who are too old, for instance. The possibility of judicial error or insensitivity is great in such areas. Labelling the state action as "unreasonable" only begs the question of the extent of unreasonableness in the statute. Because there are degrees of unreasonableness, the Court should allow Congress to participate in this determination, particularly when the Court is unsure of its judgment. After all, the state obviously had "reasons" for its actions. The issue is whether or not it had unconstitutional reasons. If the liberal members of the Court maintain that judicial intervention is justified only when a state action is totally unreasonable, virtually beyond redemption, they

²²⁷ "[O]ur review of distinctions that Congress draws in order to make allocations from a finite pool of resources must be deferential, for the discretion about how best to spend money to improve the general welfare is lodged in Congress rather than the courts." *Lyng v. International Union, UAW*, 108 S.Ct. 1184, 1193 (1988) (citing *Bowen v. Owens*, 476 U.S. 340, 345 (1986)).

are falling into an ossifying trap similar to the problem caused when the Court had to choose between strict scrutiny and rational purpose review. The standard of unconstitutionality may be so high that effective judicial review of contemporary problems is impossible, or else the standard becomes a conclusion that obfuscates the complexities of the issue.

To put the problem another way, the Court has a duty to root out unconstitutional prejudices. But some prejudices are more reasonable than others. In his classic work on prejudice, Gordon Allport concluded: "The distinction between a well-founded generalization and an erroneous generalization is very hard to draw . . ." ²²⁸ Nobody can properly sort out all impermissible prejudices or determine exactly which prejudices are unconstitutional and which are not. Such delicate judgments should not be left exclusively in the Court's hands. For example, Justice Marshall based his dissent in *Lyng v. International Union, UAW* on the ground that the federal government acts "irrationally" whenever it discriminates against a politically unpopular group. In *Lyng* the unpopular group was striking union members who would be receiving food stamps. But virtually all losers in a legislative battle are to some degree, by definition, politically unpopular. It may be mean-spirited and counterproductive to pass laws that aid management against labor, but it is not necessarily "irrational." Otherwise, any change in labor law could be characterized as the triumph of the majority, who passed the law, over a politically unpopular group, be it labor or management. Justice Marshall may really be arguing that Congress never should use food as a political weapon. I endorse such a substantive conception of justice, but have trouble concluding that those who believe otherwise are totally irrational.

C. Doctrinal Analogues Outside Section Five

In several areas, the United States Supreme Court has interpreted the Constitution to permit Congress to authorize the states to create laws that the Court initially considered unconstitutional: commerce regulation (the dormant commerce clause), ²²⁹ interstate compacts, ²³⁰ import and ex-

²²⁸ G. W. ALLPORT, *THE NATURE OF PREJUDICE* 19 (1954). Allport then observes that people are least able to see their own prejudices. *Id.* at 20. Some "prejudices" are desirable, even essential to a well-formed society: "Indolence, negligence, want of order and method, obstinacy, fickleness, rashness, credulity; these qualities were never esteemed by anyone indifferent to character; much less extolled as accomplishments or virtues. The prejudice, resulting from them, immediately strikes our eye, and gives us the sentiment of pain and disapprobation." D. HUME, *supra* note 196, at 68.

²²⁹ See *Parker v. Brown*, 317 U.S. 341 (1943), in which the Court upheld a state scheme that violated the commerce clause because the Court believed Congress had authorized such a plan. The Court has stated in dictum that Congress has the power to "permit the states to regulate commerce in a manner that would not otherwise be permissible . . ." *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769 (1945).

²³⁰ See *United States Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452 (1978); *Northeast Bancorp. Inc. v. Board of Governors of the Federal Reserve System*, 472 U.S. 159 (1985); *Cuyler v. Adams*, 449 U.S. 433 (1981).

port duties and taxation of federal instrumentalities.²³¹ These analogies support the related doctrines of limited dilution and a double standard, even though they are distinguishable. In the examples, the Court held that Congress has plenary power over those areas, which necessitated giving Congress the power to alter Supreme Court decisions. The fourteenth amendment falls primarily under the judicial sphere; Congressional power within section 5 is not plenary, but supplementary and/or complementary. Yet Congress would not gain an upper hand in this vital area of individual rights. Under the proposed equal protection test, the Supreme Court has the final authority to determine which areas within equal protection are reviewable or unreviewable by Congress.

Those four fields differ substantively from equal protection claims. Professor Tribe observed that none of the Congressional powers which can be invoked to override Supreme Court adjudications involve "private rights against government action (such as the commands of the fourteenth amendment)."²³² Tribe's statement seems slightly excessive; the ability to engage in commerce in any state has elements of a "private right," similar to the "fundamental right" out of states have to practice law on terms of substantial equality with instaters, as protected by the Privileges and Immunities Clause of Article IV, section two.²³³ But even if one accepts Tribe's distinction, it does not reach the question we are considering: what ought to be the commands of the fourteenth amendment? Must the dictates of the fourteenth amendment always fall equally on the states and on Congress, even though Congress arguably has better fact-finding abilities, is less likely to be seized by a narrow and vicious factions,²³⁴ and better reflects the majority's will?

Tribe's reply to those rhetorical questions might be that the dormant commerce clause cases exemplify judicial protection of background rules, "negative judicial inferences from a constitutional grant of power to Congress."²³⁵ In other words, the court is acting as Congress' agent. The fourteenth amendment is an area of judicial supremacy. But a similar argument could be made to explain the proposed change in section 5 doctrine — in certain difficult equal protection cases, the court would be acting as a partner-agent, not as a boss. The text has given Congress power to enforce the fourteenth amendment. The question is the scope of that power.

For better or worse, Tribe's distinction between private rights cases and the "background rules" decisions does not perfectly reflect existing

²³¹ See, e.g., L. TRIBE, *CONSTITUTIONAL LAW* *supra* note 55, at 521. Congress also has limited power to change the law of "standing." See, G. GUNTHER, *CONSTITUTIONAL LAW* 1573 (11th ed. 1985).

²³² L. TRIBE, *CONSTITUTIONAL LAW*, *supra* note 55.

²³³ *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 281 (1985).

²³⁴ One of Madison's main arguments in *The Federalist Papers* was that a large representative government was less vulnerable to faction than a small one, see G. WILLS, *EXPLAINING AMERICA*, 193-200, 218-230 (1981).

²³⁵ L. TRIBE, *CONSTITUTIONAL LAW*, *supra* note 55, 403-04.

doctrine. The Court has not always equally applied the fourteenth amendment to state and national governments. In addition to *Richmond* and *Metro*, the main examples are in criminal procedure. Federal defendants have a Fifth Amendment right to a grand jury indictment,²³⁶ but state defendants have no similar right under the fourteenth amendment. Both state and federal criminal defendants have a constitutional right to a jury, but they do not have identical constitutional rights to either the size of the jury or to jury unanimity for convictions.²³⁷

The Court has edged toward a double standard in several other areas. Two student Notes have concluded that the Court's bewildering resolution of aliens' constitutional claims can only be explained on the ground that Congress has more power than the States to regulate aliens, based upon the explicit Constitutional authorization that Congress can regulate immigration.²³⁸ In similar free speech cases, the Court deferred to a congressional ban of secondary boycotts, which prevented a union from protesting the Russian invasion of Afghanistan,²³⁹ but rejected a state court's determination that an NAACP boycott of white merchants during the civil rights movement caused recoverable damages.²⁴⁰ Finally, in *Plyler v. Doe*, the Court implied that it might have ruled differently if Congress had created a general policy proscribing all benefits to undocumented aliens to deter illegal immigration.²⁴¹

D. Nonjudicial Proposals to Enhance Congressional Powers

Although this proposed change in section 5 doctrine is novel, it is far from revolutionary. Several lawyers have proposed interpretations of section 5 which would enhance Congressional power to construe the fourteenth amendment. Attorney Stephen Galebach maintained that Congress has the power to overrule *Roe v. Wade*, the abortion case, under section 5. Galebach argued that because Congress can better determine when life begins due to its superior fact-finding abilities, Congress could

²³⁶ See *Duncan v. Louisiana*, 391 U.S. 145 (1968).

²³⁷ See, e.g., *Apodaca v. Oregon*, 406 U.S. 404 (1972); *Johnson v. Louisiana*, 406 U.S. 356 (1972).

²³⁸ Note, *The Equal Treatment of Aliens: Preemption or Equal Protection?*, 31 STAN L. REV. 1069 (1979) and Note, *State Burdens of Resident Aliens: A New Preemption Analysis*, 89 YALE L. J. 940 (1980). See *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976). Several scholars have proposed that these cases are actually based on the supremacy clause. See, e.g., Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 70 COLUM. L. REV. 1023 (1979); Choper, *Discrimination Against Aliens*, in J. Choper, Y. Kamisar and L. Tribe, *The Supreme Court Trends And Developments* (1983); Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255.

²³⁹ *International Longshoremen's Association v. Allied International, Inc.*, 456 U.S. 212 (1982).

²⁴⁰ *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

²⁴¹ 457 U.S. at 224-26.

conclude that life and personhood began at conception. That factual finding would strip *Roe* of one of its assumptions: nobody knows when life begins.²⁴² While President, Richard Nixon proposed congressional legislation banning forced busing of school students in segregated school districts. Nixon argued that Congress had power under section 5 to limit judicial power because of the "fundamental difference" between a "remedy" such as busing and the "right" not to be racially discriminated against.²⁴³

Professors Ely and Tribe attacked Galebach's maneuvers as an unconstitutional subterfuge which would gut constitutional rights.²⁴⁴ Suddenly the meaning of the fourteenth amendment would be determined by an electoral majority. Professor Bork criticized the Nixon proposal from the opposite perspective; the Supreme Court erred in *Katzenbach* in holding that Congress has any supplemental powers under section 5, much less any power to reverse or alter Supreme Court decisions.²⁴⁵ Professor Gordon summed up the academic disapproval of diminishing constitutional rights by forming a Congressional majority under section 5, rather than by proceeding through the supermajoritarian amendment process: "Congress has power to overturn empirical findings of the Court; but it can do so only as long as it does not infringe on the normative component of the judicial decision."²⁴⁶ One cannot be sure how these academics would react if the dilution expanded equal protection and due process instead of contracting those clauses. Furthermore, such fundamental decisions as *Brown* and *Roe* would not be affected by this doctrine. They involve such fundamental individual rights that governmental abrogation by either the states or Congress is impermissible.²⁴⁷

Professor Cohen has argued that Congress should have the power to alter any of the Court's "federalism" decisions, but not any of the Court's "liberty" decisions.²⁴⁸ For example, Congress could change any judicial interpretations of the Tenth amendment, but none of the Fourteenth amendment. Cohen explained that the "political safeguards of federal-

²⁴² Galebach, *A Human Life Statute*, THE HUM. LIFE R. 5 (1981) (reprinted in 127 Cong. Rec. 288 (daily ed. Jan. 9, 1981)).

²⁴³ Quoted in G. GUNTHER, *Constitutional Law* 719 n.2 (11th ed. 1985).

²⁴⁴ Ely and Tribe, *Let There Be Life*, N.Y. Times, March 17, 1981, cited in G. GUNTHER, *supra* note 231, at 965 n. 14.

²⁴⁵ R. BORK, *CONSTITUTIONALITY OF THE PRESIDENT'S BUSING PROPOSALS* (1972).

²⁴⁶ Gordon, *The Nature and Uses of Congressional Power Under Section Five of the 14th Amendment to Overcome Decisions of the Supreme Court*, 72 NW U. L. REV. 656, 691 (1977).

²⁴⁷ See *Bolling v. Sharpe*, 347 U.S. 497 (1954).

²⁴⁸ Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 614 (1975). See also Cohen, *Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma*, 35 STAN. L. REV. 387 (1983). Professor Choper made a similar distinction when he proposed that the Supreme Court be far more judicially active in reviewing "rights" cases than structural issues. J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980).

ism," which check Congressional overreaching in federalism cases, are irrelevant in individual rights issues. The states can better protect themselves in the national political arena than can individuals. Cohen's conclusion resembles Gordon's: "congressional judgment rejecting a judicial interpretation of the due process or equal protection clauses—an interpretation that gave the individual procedural or substantive protection from state and federal government alike—is entitled to no more deference than the identical decision of the state legislator."²⁴⁹ Cohen's proposal may give too much power to Congress — the constitutional structure is one of our greatest protections against tyranny. There is no reason to completely preclude the Court from that area of constitutional interpretation.²⁵⁰

Professor Burt argued that Congress has significant power under section 5 to expand equal protection "around the edges" of existing doctrine: "The Court could approve Congressional action that reshaped Court doctrine to make it responsive to conflicting interests in a manner that the Court itself might not comfortably be able to reach."²⁵¹ Burt turned the concerns over judicial competence—the inability to draw principled lines—into an argument justifying enhanced Congressional power. He specifically suggested that Congress might have the power to "partially reverse" *Miranda v. Arizona's* requirement that police read suspects a specific list of rights.²⁵²

The scholars' fear of dilution is understandable. But this Article's proposition will not dilute existing dilution doctrine, which permanently protects existing equal protection rights. The Court would only tolerate dilution of those equal protection rights which plaintiffs would otherwise not receive under existing law. The hostility to any dilution helps create the constitutional straightjacket that encumbers judicial protection of many individuals and groups, such as poor children. The Court knows that any constitutional remedy²⁵³ it creates is virtually permanent.²⁵⁴ Because all decisions against the states apply to Congress, the prudential

²⁴⁹ Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 614 (1975).

²⁵⁰ See generally Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341.(1985).

²⁵¹ Burt, *Miranda and Title II: A Morgantic Marriage*, 1969 SUP. CT. REV. 81, 121 (1969).

²⁵² *Id.* at 123. Professor Burt never really integrated this "partial reversal" concept with the *Morgan* anti-dilution doctrine, which Burt characterized as "seemingly . . . an afterthought." *Id.* at 114.

²⁵³ The Court of course can reverse itself. Amendments are fortunately infrequent.

²⁵⁴ Constitutional remedies are necessary to vindicate constitutional rights, but the Constitution rarely mandates a specific remedy: "With rare exceptions, the Court has not read the Constitution to require particular remedies for violations of its express prohibitions; the choice of remedies is *peculiarly a matter of policy*, which requires the exercise of legislative judgment or equitable discretion." L. TRIBE, CONSTITUTIONAL LAW, *supra* note 55 (emphasis added) (footnotes omitted).

forces of federalism and of deference to a co-equal branch combine to encourage judicial restraint. These legitimate constraints tempt the Court to limit its inquiry to issues of formal equality and to periodic, *ad hoc* solicitude for particularly sympathetic groups, such as the mentally retarded or children of illegal aliens.

Responding to charges that the Court acts either incompetently or illegitimately in its resolution of many contemporary constitutional issues, several liberal scholars have proposed that Congress become a more equal participant in the constitutional discourse. Paul Brest argued:

Most citizens, politicians, and scholars seem to agree with or acquiesce to the Supreme Court's claim to be the ultimate interpreter of the Constitution . . . The net effect is to systematically exclude citizens and their representatives from some of the most fundamental decisions of the polity. This is completely at odds with the classical conception of citizenship.²⁵⁵

Brest has continued to struggle with determining the proper scope of Congress' role in constitutional interpretation. His most recent diagnosis is more pessimistic: "Congress' traditions and practices of considering constitutional questions are so weak and untrustworthy that it is not ready to enter into a dialogue. It needs a tutorial first."²⁵⁶ Perhaps allowing Congress to interpret the equal protection clause in a few situations where the Court would not otherwise act might be a good place to begin that tutorial.

Specific non-section 5 proposals to alter the relationship between the Court and Congress have ranged from the relatively humble to the dangerously sweeping. Professor Tribe suggested a change in constitutional doctrine that would undermine his general proposition that the Congress cannot authorize the diminution of private rights. He proposed that the Court's determination of what process is due under the due process clause of the fourteenth amendment should no longer be limited to Justice Holmes' "all or nothing" approach set forth in *Bi-Metallic, Inv. Co. v State Board of Equalization*.²⁵⁷ Holmes interpreted the due process clause to require meaningful procedures for individual adjudications, but not to provide any participation in decisions affecting large numbers of people. Tribe recommended that the Court should make a more nuanced due process analysis when the plaintiffs are members of a small group, caught in the doctrinally grey area between being individually affected and being the subject of general rules and policies. According to Tribe, the Supreme

²⁵⁵ Brest, *Who Decides?*, 58 S. CAL. L. REV. 661, 670 (1985). DeTocqueville put the point more generally: "But I maintain that in the most powerful land perhaps the only means that we still possess of interesting men in the welfare of their country is to make them partakers in the government." A. DETOCQUEVILLE, *DEMOCRACY IN AMERICA* 252 (1945).

²⁵⁶ Brest, *Congress as Constitutional Decisionmaker and its Power to Counter Judicial Doctrine*, 21 GA. L. REV. 57, 103 (1986).

²⁵⁷ 239 U.S. 441 (1915).

Court should "adjust the mix of direct and representative participation to which the individual is entitled."²⁵⁸ Because such balancing is obviously difficult, Tribe suggested that the Court allow a "legislative remand" that closely resembles this Article's proposal:

Instead, the decisions might frame a constitutional common law, leaving legislatures with the power to design other methods of protecting the individual's participatory interests. Thus, such a jurisprudence could effect a 'remand to the legislature', prodding it to discover and develop new systems of 'due process' more compatible with the needs of the administrative state.²⁵⁹

Tribe neither grounded his plan in text, nor did he explain why his technique should be limited to innovative procedural due process remedies,²⁶⁰ which clearly are individual rights. This Article differs by basing its version of the "constitutional remand" in the text of section 5, and by widening the scope of the idea to cover the entire fourteenth amendment, substantive as well as procedural. Yet this Article's approach resembles Tribe's position in that it does not determine the full contours of the proposed doctrine. The caselaw would be a form of evolutionary constitutional common law,²⁶¹ hopefully leading to additional constitutional rights for the aged, the infirm, the mentally ill and the poor (particularly poor children). It might also have applicability to new issues, such as AIDS. Thus it would retain the classic strengths of common law- evolving over time, uncramped by rigid theory, reviewable by the legislative branch.

Tribe's "judicial remand" already exists in American Constitutional law and theory. In the course of explaining why the remand would be a major tool of "structural justice," Tribe presented its pedigree:

²⁵⁸ L. TRIBE, *CONSTITUTIONAL LAW*, *supra* note 55, at 766. Tribe has also suggested that certain individual rights issues might best be resolved under a common law model: "A common law basis for determining rights for refusing treatment also has the advantage of leaving the issue open for the legislature to establish different standards and procedures for dealing with these difficult problems." *Id.* at 1366 n. 15.

²⁵⁹ *Id.* at 767.

²⁶⁰ A student note argues that Congress has broad powers to reinterpret the three doctrinal prongs of the due process clause: procedural due process, substantive due process, and the incorporation doctrine. Note, *Congressional Power to Enforce Due Process Rights*, 80 COLUM. L. REV. 1265 (1980). Thus Congress might have the power to legalize homosexuality as a constitutionally protected privacy interest. Of course, under my theory, the Court could initially protect homosexuals, but leave the final decision to Congress.

²⁶¹ See, e.g. Monaghan, *The Supreme Court, 1974 Term— Foreward: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975). See also G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).

Both the *Panama Refining* approach and that of *Hampton v. Mow Sun Wong* and *Bakke* put pressure on legislatures and/or agencies to reconsider the invalidated provision from a fresh perspective, and both approaches leave open the possibility that the court may uphold a somewhat revised provision if such reconsideration leads to its enactment either in an altered form, or in the same form but by a different body. Thus both approaches bear some similarity to the notion of "remand to the legislature" often advocated by constitutional and common-law commentators.²⁶²

In short, both judicial and academic precedents exist that resemble this Article's proposal.

Professor Perry tried to resolve the tension between judicial review by nine elected judges and the presumptive validity of legislation in a democratic society by proposing that Congress can use its Article I powers which allow it to establish the jurisdiction of lower federal courts to trump Supreme Court constitutional opinions.²⁶³ Perry's plan shifts too much power to Congress, which could frustrate all constitutional rights by clever limitations to jurisdiction. One does not want to give Congress any power to threaten such essential opinions as *Brown v. Board of Education*.²⁶⁴ Certain issues are properly beyond the legislative domain, unless the legislatures seek to amend the Constitution itself.

Allowing Congress to dilute some of the Court's equal protection decisions incorporates many of the above themes. It is a concrete way to increase the constitutional dialogue between Congress, the Court and the citizenry. Dialogue, after all, implies a discussion between relatively equal parties. Congress and the Court are not engaging in a serious dialogue if either can always do whatever it wishes. Expanding section 5 power grants more power to the Court and Congress (at the expense of the States), forcing them both to reconsider the contours of equal protec-

²⁶² L. TRIBE, CONSTITUTIONAL LAW, *supra* note 55, at 1680 (footnotes omitted).

²⁶³ M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 128 (1982). Professors Gunther and McCloskey have both argued that the Court should sometimes give rational purpose scrutiny some "bite." See Gunther, *The Supreme Court, 1971 Term—Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1982); McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34. The Court should not accept post hoc justifications for a law but should look at the articulated purposes. Gunther also proposed that the Court should empirically assess the fit between the ends and the means "largely in terms of information presented by the defenders of the law rather than hypothesizing data of its own." Their proposals are troubling because they provide the Court with no principled way to decide when to invoke that scrutiny. The economic substantive due process doctrine of *Lochner* could suddenly reappear. Major doctrinal shifts can occur through seemingly minor reallocations of burdens of proof. The section 5 proposal would allow intervention in some of these cases - such as *U.S. Retirement Board v. Fritz*, 449 U.S. 166 (1980) - but would avoid the permanent constitutionalization of those interventions.

²⁶⁴ 347 U.S. 483 (1954).

tion. It provides impoverished individuals with direct access to the federal system instead of forcing them to negotiate through Congress. The Court can be far more creative, knowing that it can be checked by the legislature. That check also becomes more acceptable as the Court ventures away from the relatively straightforward, noncontroversial ideal of formal equality into the more empirical, debatable arenas of equal opportunity, egalitarianism and the elimination of unreasonableness. In a sense, the Court would be encouraging Congress to use its section 5 powers to advance equality beyond previously existing judicial interpretations of the fourteenth amendment by showing Congress problems of inequality that need to be addressed. For example, Congress should be forced to decide if states can charge fees to poor children for taking a school bus. Such egregious behavior should not be legitimated as a completely acceptable form of constitutional behavior.

Focusing on poverty and poor young people clarifies what factors might be relevant in expanding the fourteenth amendment beyond the relatively noncontroversial area of procedural due process. The prior exploration of poor childrens' equal protection rights (and non-rights) demonstrates how the Court could develop a major body of substantive constitutional common law that could partially implement some of the constitutional norms which currently remain unenforced or underenforced.²⁶⁵ The Court could remind the country of its constitutional obligations to pursue substantive equality, forcing the majority to consider aspirational values that remain unfulfilled. Such a combination of moral and legal pressure would undercut the complacency that results from existing constitutional doctrine; defendants tend to believe that their actions are right because they are constitutional. Instead, the Court would tell the elected branches their actions violate constitutional norms, but that they have the ultimate power to live under that cloud or to remove that stigma.

IX. JURISPRUDENTIAL RESERVATIONS

A. *Conservative Criticisms*

The initial conservative response to this idea and its application to poor children would probably resemble the critique of Professor Michelman's proposal to finance "just wants."²⁶⁶ Conservatives would argue that ex-

²⁶⁵ Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978). Professor Sager argued that Congress has a duty to enforce those constitutional norms that the Court does not enforce because of institutional limitations. *Id.* at 1264. This article's proposal would enhance that prospect because the Court, not as inhibited by concerns over its competence, could nudge the Congress in the right direction. Poor children should have constitutional support. This proposal might backfire if Congress repeatedly repudiated the judicial vision. But such a confrontation, which Congress would win over the short run, would at least bring the issue to the public's attention.

²⁶⁶ See *supra* notes 139-45.

pansion of section 5 could not be justified by the text or history of the Constitution.²⁶⁷ Judicially mandated aid for poor children would be an illegitimate exercise of judicial power, reminiscent of *Lochner*. Increasing aid to the poor would also constitute bad policy. American society has already been corrupted by an excessive egalitarianism that saps the will to succeed, and by an overly intrusive judiciary which undermines the populace's will and capacity to rule themselves.

Note that several of the classic arguments favoring judicial restraint have less than their usual weight. The proposed doctrine has acknowledged and incorporated some of the reservations about judicial intervention. Aggressive judicial review is far more "legitimate" if it can be trumped by the national elected branches. The electorate, through their Congressional representatives, retains the "last word" concerning these contentious egalitarian issues. Concerns about judicial competence in formulating rights, discovering violations, establishing standards and formulating remedies are reduced because Congress can review the Court's efforts. Most contemporary problems of equality, such as equal opportunity, have an empirical component; no abstract, formalistic test exists to determine when opportunity has become equal (or even tolerably unequal). The Court can lead and experiment, knowing Congress may correct its initial assessments.

Many contemporary conservatives and some liberals may also complain about the doctrine's effects on federalism. Both by creating a double standard that places a greater burden on the States than on Congress and by allowing greater judicial intervention, backed up by subsequent Congressional intervention, the redefinition of section 5 could lead to an excessively powerful national government. Yet the purpose of the fourteenth amendment in general, and section 5 in particular, is to allow the Court and Congress to have more power over the states. State and local governments are more vulnerable to factions which can brutalize losers in the political arena. Congress cannot be expected to monitor and prevent all new forms of tyranny; individuals should be able to immediately turn to the Courts for relief from state statutes that have unconstitutional traits. Furthermore, the states still retain the "political safeguards of federalism."²⁶⁸ They can lobby Congress to overturn any judicial opinions that they believe were incorrectly decided under this doctrine.

²⁶⁷ See Munzer & Nickel, *Does the Constitution Mean What It Always Meant?* 77 COLUM. L. REV. 1029, 1047 (1977). For a discussion of the history of section 5, see Burt, *Miranda and Title II*, *supra* note 249, at 84-101.

²⁶⁸ Professor Wechsler coined the phrase "political safeguards of federalism" to help explain the theory that the states must defend themselves against federal oppression through the political process instead of through the judiciary. See, e.g., Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

B. Liberal Criticisms

Like the conservatives, many liberals may have both theoretical and practical objections to the expansion of section 5 powers. Allowing Congress to reverse the Court dilutes Dworkin's conception of "rights," which are individual trumps over collective action.²⁶⁹ The precedents this Article has used—setting a double standard for jury procedures, for example—only demonstrate that those decisions were wrong, not that they should become a model for a new fourteenth amendment jurisprudence. Such a critique is not so troubling if one is not a "pure" rights theorist, believing that most, if not all, rights sometimes must be modified. Indeed, any effort to redistribute wealth conflicts with the "right" of the more wealthy to be allowed to enjoy their property as they see fit. According to the philosopher Thomas Nagel, redistribution does not easily fit into rights rhetoric, which is based upon consent.²⁷⁰

The proposal is risky even if one does not subscribe to a pure rights theory. Dilutable individual rights may corrode undilutable individual rights. The Court, particularly the present Court, might use this new discretion to undermine existing law without expanding equal protection. Such progressive cases as *Plyler* and *Cleburne* might be recharacterized as dilutable section 5 cases. The mentally retarded, who have just started to receive constitutional protection in *Cleburne*, would suddenly find themselves at the mercy of Congress whenever they persuaded the Court to extend *Cleburne*. Any time the Court felt enough sympathy for a new set of plaintiffs, they would only provide this vulnerable protection. New non-dilutable equal protection rights would be rarities. In short, this buck-passing technique would make decisions too easy for the Court, leaving individuals insufficiently protected even when they prevail. Perhaps most importantly, liberals should be wary of making any doctrinal arguments that broadly enhance the Court's power, given the Court's current personnel.

Furthermore, one cannot easily predict the doctrine's impact; how will it affect due process privacy rights, the Bill of Rights, state action, and other difficult issues that arise under the fourteenth amendment? The proposed sharing of constitutional power may also dissipate responsibility. Everyone now knows who is primarily responsible for helping or not helping the poor: the Executive, Congress and the states. If the Court

²⁶⁹ R. DWORIN, *TAKING RIGHTS SERIOUSLY* (1977). Even Dworkin hedges; fundamental rights may be trumped by the government "when necessary to protect rights of others, or to prevent a catastrophe." *Id.* at 191.

Some tension between rights theories and redistribution proposals may be inevitable: "[Rights] give every person a limited veto over how others may treat him . . . This kind of unanimity condition is possible only for rights that limit what one person may do to another. There cannot in this sense be rights to *have* certain things—a right to medical care, or to a decent standard of living, or even a right to life." T. NAGEL, *MORTAL QUESTIONS*, *supra* note 168, at 114.

²⁷⁰ *Id.*

and Congress shared that obligation, based upon a division of powers which would partially be a function of inevitably subtle, even arbitrary doctrinal distinctions, the potentially confused public may either feel either the problem is being handled properly or that their representatives are no longer accountable for the issue.

Such arguments can be raised against any effort to enhance judicial discretion. But as Chief Justice Storey noted years ago: "It is always a doubtful course, to argue against the use or existence of a power, from the possibility of its abuse."²⁷¹ Perhaps we liberals should withdraw from making any sweeping propositions while the Court grows increasingly conservative, and wait until a more sympathetic group of Justices assumes power. That wait, however, may be a long one. Liberals should follow the example of the conservative academy during the Warren Court era; conservative scholars developed both abstract theories and specific counter-proposals to justify their criticisms of that Court. In a sense, the liberal academic wing may be reduced to a shadow Court for the foreseeable future. It may lose some of its voice if it only engages in theory, case by case counterattacks, or history. The liberal bloc must offer counterdoctrine that responds to the changing values of our society and of the Court.

The fear of dilution of existing law may be excessive. Cases such as *Cleburne* or *Boddie* should not be threatened because they were decided on the assumption that the challenged action was so inappropriate, so irrational, that neither Congress nor the States could engage in such activity. The Court would be mangling this proposal if it first diluted existing rights and then failed to provide relief to plaintiffs who desperately need the novel relief.

An additional liberal critique is that the change in law would make little difference; the meager benefits would be offset by the potential costs. Even if litigants could persuade the Court to use the doctrine aggressively, Congress would reverse any significant decisions. Thus the doctrine would not come close to addressing the problems of poverty that were raised in the earlier part of this Article. For example, Congress established the underlying legal structure that supported the state law denying additional relief to large families in *Dandridge v. Williams*. The two recent food stamp cases *Lyng v. Castillo*²⁷² and *Lyng v. Industrial Union, UAW*, interpreted federal laws which were unsympathetic to the poor. After *Roe*, Congress provided less funding for abortions than many states. The first place Congress probably would look to reduce government deficits would be any judicial section five cases that gave Congress the final word.²⁷³

²⁷¹ *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 344 (1816). See also Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 362 (1985).

²⁷² 477 U.S. 635 (1986).

²⁷³ 108 S.Ct. 1184 (1988).

There is cause for such pessimism about our elected representatives. Yet the Constitution is one of the clearest manifestations of the belief that this is a country of hope, and of the faith, perhaps naive, in the ultimate fairness of a mixed government that is primarily democratic. Congress may hesitate before reversing many of these decisions, particularly those that will not cost much money. It is hard to imagine a Congress that would charge poor children to take school buses²⁷⁴ or would create unique political hurdles for the poor. Perhaps the electorate will not re-elect a Congress that consistently repudiates the more progressive decisions of the Court.

The technique is also somewhat unsatisfactory because it does not offer permanent, substantive protection to the poor. Although it does have a substantive component, it resembles structural and procedural solutions because all of its substantive results can be eliminated by Congress. It will probably not make a serious dent on the profound problems facing our country. Yet even if the idea does not result in significant transfers of wealth, it might help prevent such gratuitously cruel policies as charging poor children to use public school buses. In addition, those seeking constitutionalization of a guaranteed annual income face even more serious problems of initially getting the Court to accept their interpretation, and of implementing that interpretation. For example, how is the Court to determine how much welfare a poor worker must receive, given perpetual changes in such factors as tax rates,²⁷⁵ minimum wage scale and availability of work? How is the Court to determine the appropriate mix of cash and non-cash benefits? Should welfare benefits be conditioned upon the parent's willingness to accept work, or at least to enroll children in an early learning center?²⁷⁶ Perhaps this article's compromise is an appropriate way for the Court to explore these problems without making serious, irreversible blunders.

C. Institutional Criticisms

The approach can also be criticized for being unwieldy. The Court would have to write two difficult opinions instead of one. It would first decide if equal protection has been violated, and then determine if its decision

²⁷⁴ Congress has passed a law that requires the states to provide free schooling to handicapped children if the states wish to receive federal assistance, Education of the Handicapped Act, § 601, 20 U.S.C.A. § 1400 et seq. For a discussion of that act, see Honig v. Doe, 484 U.S. 305 (1988).

²⁷⁵ The federal tax rates perpetually shift, particularly when one includes social security. In the past few years, the tax burden has increased for the poor. A family of four at the poverty line was paying "more than 16 percent of its income in direct taxes, almost double the percentage paid in 1965." Danzinger and Weinberg, *Introduction* 10, in *FIGHTING POVERTY*, *supra* note 138.

²⁷⁶ These suggestions were made by the Chicago Tribune. CHICAGO TRIBUNE, MILLSTONE, *supra* note 36, at 298. Voters have been more willing to provide services than discretionary income. *FIGHTING POVERTY*, *supra* note 138, at 24.

is final or is a section five decision. Two bodies of doctrine would have to be developed, two sliding scales, both relying on malleable standards. Plaintiffs who only received dilutable equal protection would wonder why they did not receive permanent relief.

Once again we see an argument that is not completely rebuttable. It is difficult to argue that two muddles are better than one. Nevertheless, the increased muddle may reflect the increased complexity of contemporary equal protection concerns. Certainly no bright line between the "rational purpose" test and the "intermediate scrutiny" text exists after *Cleburne*. The Court acknowledged that some regulation of the mentally retarded is necessary, but that housing bans were "irrational." Although the result was correct, the unchecked use of the very flexible "rationality" test could lend to disastrous results. The Court may err in finding a reasonable belief to be "irrational." For example, what would happen if the Court concluded that excluding AIDS victims from schools is "irrational" by relying on medical evidence that erroneously demonstrated that children cannot easily spread the disease, an error caused by a subsequent mutation of the virus (or even by a misinterpretation of existing data)?

The proposal would eventually generate a crazy-quilt set of results that do not mesh well with the prevailing judicial themes of consistency, principle, and precedent. Over a period of years, Congress would probably reverse some of Court's decisions, while letting others stand. The pattern would primarily reflect political motivations, difficult to decipher since Congress has no obligation to explain itself or to achieve consistency. Nevertheless, the Court can interpret Congressional action. When the Court delegated a final decision to Congress under this proposal, it only delegated the specific issue. Thus, for example, if the Court had held in a subsequent reconsideration of *Kadrmas* that states could not charge school bus fees, yet also held that its decision was reversible under section five, then Congress could obviously pass a law authorizing the states to charge such fees. But Congress could not pass a law precluding the Court from considering any other equal protection issues involving indigency. Nor should the Court interpret any Congressional reversal so broadly. The Court must retain the power initially to determine all fourteenth amendment claims.

Even if the Court is initially rebuffed by Congress on a certain issue, it could continue to try to protect a given group in other ways. It could remain committed to the analysis that led it to protect the group, or the right in the first place. The Court should only defer to Congress on the specific issue. Perhaps a series of opinions would convince Congress and the public that the Court was correct to expand equal protection to help poor children. The process might take years, but it would be worth the effort. The present doctrine creates the impression that poverty is not a major constitutional concern, and that the government can, with a few narrow exceptions, treat poor people as it wishes. In addition, the Court's existing constitutional treatment of the poor is hardly graced with consistency, much less elegance.

The doctrine would also create some anomalies. The Court might strike down a harsh state welfare law, such as *Dandridge v. William's* cap on amounts given to family, yet tolerate an equally severe federal food stamp limitation, such as the denial of food stamps to families who have a worker on strike in *Lyng v. International Union, UAW*. In other words, if a state had limited food supplies to poor families the way Congress did in *Lyng*, the Supreme Court might have found such a limitation a section five violation. Such inconsistency is certainly disconcerting, but it might be politically healthy. The Court would be performing a prodding role, showing Congress that some of its laws exist under a constitutional cloud. The Congressional law may be ultimately constitutional, if only because of the judicial deference given to another co-equal branch over an admittedly difficult issue, but the law clashes with the underlying aspirations of the Equal Protection Clause.

At least one more problem remains. Could the Court ever change its mind, making certain dilutable rights nondilutable or certain nondilutable rights dilutable? By this time, the reader will probably not be surprised to learn that the author subscribes to a one-way ratchet theory. In other words, if a series of section five cases eventually creates a coherent doctrine that is implicitly ratified by Congressional inaction over a long period of time, the Court might make that group of rights nondilutable. Equal protection is an evolutionary doctrine. If certain decisions survive the test of time, thereby generating powerful reliance expectations, they may deserve to become permanent constitutional law. However, the Court should not dilute rights it has previously found to be permanent. It made its initial decision on the assumption that the action was so "unreasonable" that the other branches could never utilize power in that particular way. When a state or federal action is found to be so egregious, it should not be constantly re-evaluated. Finally, the Court should be reluctant to transfer rights between dilution and nondilution because that process would probably create more confusion than benefits. The proposed doctrine is already admittedly complex, difficult to administer and prone to generating inconsistent results. Creating an additional set of tests to determine when dilutable rights become nondilutable would make the doctrine even more difficult to manage.

X. CONCLUSION

The dilemma of democracy is not just distrust—distrust of majorities, minorities, legislatures, executive branches, courts, other individuals, even oneself. Each of us must also decide when to trust the other, knowing that at any time some or most of us can turn to good or evil. All of us are both "the Other" and "Thou." Failure to recognize such ambivalence leads either to an atomized society which excessively relies upon guns and/or law for protection or to foolish vulnerability. The debate over the proper scope of judicial review is one manifestation of this dilemma of human nature; we do not completely trust either the Supreme Court or

the elected branches since any organ of government can unfairly harm us. Yet we need lawmakers, adjudicators and fellow citizens—not just for protection, but also for community and self-definition.

Reevaluating section five caselaw means reconsidering one's hopes and fears. The proposal assumes substantial good faith by both the Court and Congress, an obviously controversial belief at this point in the political cycle. Thus the idea may be so premature as to be stillborn. Nevertheless, I think those of us who believe the Court ought to use its powers to help prevent the polarization of classes and races, as well as to prevent certain forms of societal cruelty and callousness, have a duty to make specific proposals to implement that belief without losing sight of democratic premises. Perhaps our offerings will be too timid or excessively aspirational. But it is part of our fate to offer imperfect solutions to a world filled with inevitable sorrow.

